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Supreme Court, U.S.
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No.

In The

Supreme Court of the United States

Duane W. Larson

Petitioner

v.

United States of America

Respondent

On Petition for Writ of Certiorari
To the United States Court of Appeals
For the Eight Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW:

Introductory Statement: This case presents this Court with an opportunity to decide a question that it has specifically reserved for decision since 1947 in U.S. v. Smith, 331 U.S. 469, 475 & n.4. The situation, for the instant case, but also for an unknown number of others, is that Larson's conviction was unconstitutional yet, through no fault of his, Larson's lawyers were ineffective and failed to suppress the only evidence used to convict Larson. After incarcerated Larson repeatedly requested, but was never given, an evidentiary hearing on any of his 2255 motions. Despite this obstacle in 1993 Larson gathered sworn affidavits from the same police officers actually involved which prove conclusively the unconstitutionality of Larson's conviction. This factual proof is probative to this very day. There will be no prejudice to the government to finally put this factual proof in issue and pass upon it. The police officers' sworn affidavit testimony does not recant. Rather the affidavits confirm that the files and records of the original case are correct and served to refresh the police officers' memories in order to develop, by affidavit, issues that were not addressed pretrial. The sworn testimony conclusively proves a 4th Amendment fundamental rights Constitutional violation. (Larson agreed in writing not to sue for the constitutional violation in return for the affidavits).

At the time Larson obtained this proof, it could no longer be presented to the court by 2255 motion because:

> "In a series of cases culminating with Sawyer v. Whitley, 505 U.S. 303 (1992), decided last Term, we have held that a petitioner otherwise subject to defenses of abusive or successive use of the writ may have his federal constitutional claim considered on the merits if he makes a proper showing of actual innocence." Herrea v. Collins,

506 U.S. 390, 404 (1993).

Larson temporarily had no remedy because he could show an unconstitutional conviction, but he could not show actual innocence. After Larson's release from parole Larson's only remedy was the extraordinary remedy of coram nobis. The 8th Circuit held:

> "Larson has not shown he is entitled to coram nobis relief, because he unsuccessfully raised on direct appeal and in prior 28 USC 2255 motions the 4th Amendment and ineffective-assistance-of-counsel claims that he raises here ..coram nobis petitioner (is) not entitled to review of issues that were considered and resolved **EITHER** on direct appeal **OR** in 2255 motion..".

This is an incorrect statement of the law of coram nobis, and it is in conflict with many long-standing decisions of this Court that repeatedly hold that the Constitution abhors a "no remedy vacuum". Those cases range from Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803) through, and in particular, U.S. v. Morgan, 346 U.S. 502 (1954). (Additionally, the 8th Circuit's opinion itself is based upon numerous errors of both fact and law, and it conflicts with its own caselaw as well).

I. Whether the 8th Circuit has decided an important question of federal law that has not been, but should be, settled by this Court because this Court specifically "reserved decision on whether the federal district courts are empowered to entertain proceedings in the nature of coram nobis 'to bring before the court that pronounced the judgment *errors in matters of fact which had not been put in issue or passed upon, and were material to the validity and regularity of the legal proceeding itself*" in U.S. v. Smith, 331 U.S. 469, 475 & n.4 (1947), and where the Committee Notes to the amendment of FRAP 4(a)(1)(C) dated 12-1-02 specifically state: "Notwithstanding Morgan, **it *is not clear* whether the Supreme Court continues to believe that the writ of error coram nobis is available in federal court",** is

this question is now ripe for decision?

II. Whether the 8th Circuit has incorrectly stated the rule of law regarding coram nobis such that the 8th Circuit now directly conflicts with this Court on two holdings in U.S. v. Morgan, 346 U.S. 502, 510-512 (1954), and also conflicts with this Court's long history of cases, such as Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803); Weeks v. U.S., 232 U.S. 383 (1914); U.S. v. Hayman, 342 U.S. 205 (1952); and Heflin v. U.S, 358 U.S. 415 (1959) which, along with Morgan, amplify this Court's abhorrence of leaving no remedy to correct a federal Constitutional fundamental rights violation?

III. Whether the 8th Circuit is in direct conflict with the 11th Circuit because the 8th Circuit has denied Larson's coram nobis because its grounds were "successive" to his 28 USC 2255 motion, whereas the 11th Circuit would require that the grounds of a coram nobis must be "successive" to a 2255 motion, thereby creating a conflict between the two circuits on the same important question of law?

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Question II: The 8th Circuit has incorrectly stated the rule of law regarding coram nobis such that the 8th Circuit now directly conflicts with this Court on two holdings in U.S. v. Morgan, 346 U.S. 502, 510-512 (1954), and the 8th Circuit also conflicts with this Court's long history of cases, such as Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803); Weeks v. U.S., 232 U.S. 383 (1914); U.S. v. Hayman, 342 U.S. 205 (1952); and Heflin v. U.S, 358 U.S. 415 (1959) which, along with Morgan, amplify this Court's abhorrence of leaving no remedy to correct a federal Constitutional fundamental rights violation 15

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8th Circuit's unpublished opinion dated 2-6-04. District Judge Montgomery's order of 2-26-03. U.S. v. Larson, 760 F.2d 852 (8th Cir.1985). District Judge Murphy's order of 7-2-87. Magistrate Becker's Report and Recommendation of 1-17-88. Judge Murphy's order adopting the R&R dated 2-23-89. Judge Murphy's order dated 7-22-94. Petition for Rehearing en banc denied 3-10-04. Affidavits from four police officers dated November 1993. Sgt. Schlueter's Police report dated 10-29-83. Lab Report # 83-1367. U.S. Parole Commission Discharge order dated 11-13-95.

STATEMENT OF BASIS FOR JURISDICTION.

The judgment of the 8th Circuit Court of Appeals was entered on 2-6-04. A timely petition for rehearing en banc was denied on 3-10-04. This Court's Jurisdiction is invoked under 28 USC 1254(1) and 28 USC 1651.

CONSTITUTIONAL PROVISIONS.

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated ..." 4th Amendment.

"No person shall be held to answer for a capital, or otherwise infamous crime, ..nor be deprived of life, liberty, or property, without due process of law; ..". 5th Amendment.

"In all criminal prosecutions, the accused shall enjoy the right ..to have the Assistance of Counsel for his defense." 6th Amendment.

STATEMENT OF THE CASE

In 1984 Larson was criminally convicted in federal court following a warrantless search of a motel room. Larson was convicted because Larson's paid counsel failed to recognize that Larson possessed a 4th Amendment reasonable expectation of privacy in his personal effects, specifically in his five closed containers wherein cocaine was concealed from view. The cocaine was discovered after the police

opened the containers for the sole purpose of searching those closed containers to determine what was inside them. Counsel's failure to raise the "container issue facet" in their pretrial motion to suppress waived the container issue per F.R.Cr.P. Rule 12(b)(3) & (f) thereby allowing the evidence discovered by officers of the Burnsville Police Department during the warrantless search of Larson's closed containers to be admitted into evidence at trial. Counsel's pretrial suppression motion argued that Larson retained a reasonable expectation of privacy in the motel room, which Larson was occupying, but for which Larson had not paid that day's rent. The closed container issue was not raised, questioned, addressed, or approached in any manner whatsoever pretrial (or after) by Larson's counsel. The cocaine discovered by the police inside Larson's containers was the *only evidence admissible at trial* against Larson. The motel room issue, not the container issue, was unsuccessfully appealed by counsel. U.S. v. Larson, 760 F.2d 852 (8th Cir.1985). In Larson's first 28 USC 2255 motion to vacate his conviction Larson alleged ineffective assistance of counsel for failing to suppress the only evidence admitted at trial because it was obtained in violation of the 4th Amendment, i.e. the "warrantless container search" law of: U.S. v. Place, 462 U.S. 696, 701-2 (1983); U.S. v. Schleis, 582 F.2d 1166, 1172 (8th Cir.1978) (en banc); and U.S. v. Ross, 456 U.S. 798, 822-3 (1982)[1]

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[1] This is still the law today. Smith v. Ohio, 494 U.S. 541, 542 (1990). "Petitioner was carrying a **BROWN PAPER GROCERY BAG** with the words "Kash 'n Karry" and "Loaded with Low Prices" printed on the outside in a manner that the officers later described as "gingerly."..Although the Fourth Amendment may permit a brief detention of property on the basis of only "reasonable, articulable suspicion" that it contains contraband or evidence of criminal activity, U.S. v. Place, 462 U.S. 696, 702 (1983), it proscribes - except in certain well-defined circumstances - the search of that property unless accomplished pursuant to judicial warrant issued upon probable cause. ..That guarantee protects alike the "traveler who carries a toothbrush and a few articles of

Larson requested an evidentiary hearing in order to develop a factual record on the container issue because Larson's attorneys did not ask any questions about the closed containers at the pretrial suppression hearing. Neither the evidence itself, nor the containers, was even brought into the suppression hearing courtroom during the pretrial hearing.

The "files and records" of the case, along with sworn affidavits obtained from the police officers during November 1993 conclusively show that there were no special circumstances that would justify a warrantless search exception for the search of Larson's containers. Larson met the police outside the motel room and refused to give them permission to enter the locked motel room. Larson also refused to give the police permission to conduct any search whatsoever, and expressly asked the police to acknowledge, for the record, that they were entering the room over Larson's stated objection. The police so acknowledged, and then entered the room. Larson was not allowed to reenter the motel room while 2 police officers searched the room and the containers. Larson was confined to the entry area of the motel room by a 3rd police officer and two motel employees during the search of the room and the five closed containers. (Affidavits of Holden and Schlueter at para 10, and Berg at para 3). After the search of the closed containers, and the discovery of the cocaine inside those containers, one of the two searching police officers came back to Larson and informed him he was under arrest for possession of a controlled substance, probably cocaine.

The district court denied an evidentiary hearing on Larson's 2255 motions based on the court's personal knowledge from having presided at the trial (not at the pretrial), and because the court believed the record "indicated" that both the motel manager, and the police discovered cocaine in "plain view". Order of 7-2-87, pp.

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clothing in a **paper bag**" and "the sophisticated executive with the locked attaché case." U.S. v. Ross, 456 U.S. 798, 822 (**1982**)".

3,5,7, & 11. In Larson's 2nd 2255 motion the court found, *on the merits*, that the motel manager had not seen cocaine afterall, in "plain view", or otherwise, and therefore the "expansion of a private search" exception did not apply. The Magistrate's R&R concluded that the record proved:

> "..a private search could not support the police search." "On the facts, the private search was simply too limited in scope to legitimize the scope of the police search. See U.S. v. Jacobsen, 466 U.S. 109 (1984)." Pp. 13-14. "..there was no evidence at trial that what the hotel manager saw was indeed cocaine. To the contrary, the hotel manager's description at trial ..comports with Officer Clark Holden's description at trial of Government Exhibits 6,7, and 8, which were later identified as **sugar-based substances.** T.T. III at 527. ..Thus, what this discussion proves is that a private search could not support the police search under either the evidence adduced at trial or the "new facts" put forth by petitioner." P.13.

The district court again refused to grant an evidentiary hearing, but continued to find that the police discovered cocaine in "plain view". Order of 2-23-89 adopting the R&R. In 1993 Larson obtained sworn affidavits from the very same police officers that had conducted the motel room and container searches swearing, under oath, that the files, records, and photographs from the case conclusively confirmed their memories that the cocaine they discovered had been concealed from view inside closed containers which they opened without a warrant for the purpose of determining what was inside the containers. The affidavit testimony shows to an absolute certainty a 4th Amendment constitutional violation. The complete affidavits are in the appendix.[2] Some relevant parts are briefly quoted here.

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[2] In return for the affidavits Larson agreed in writing not to sue the BPD or the DEA. The BPD had turned the case over to the DEA.

"12. The bags and powder, along with other items we found, were introduced as evidence at Mr. Larson's trial. After reviewing the **police reports**, evidence **photographs**, and the **trial testimony**, I can recall that trial Exhibits 1,2, and 3 were found inside a paper bag in the bathroom. The actual cocaine in these three Exhibits was concealed from view by the paper bag and opaque packaging. We could not determine what was inside until we opened all of the opaque packaging. As indicated in paragraph 2, we were called to investigate suspected narcotics. We opened the opaque packaging to determine what was inside. As a result, we found the cocaine."

"13 b. Exhibit No. 2 was packaged as follows: The cocaine was inside two or three ziplock plastic bags, which were all inside a manila envelope, which was in turn, inside the same outer brown paper grocery bag as Exhibits 1 and 3."

"13 c. Exhibit No. 3 was packaged as follows: The cocaine was inside two or three ziplock plastic bags, then inside a manila envelope. This was in turn inside the same brown paper grocery bag with Exhibits 1 and 2."

"13 d. While I have read trial transcripts that refer to the metal clasps on the manila envelopes, I simply can no longer remember if the clasps were, or were not, closed when I found the envelopes. As stated, Exhibits 1,2, and 3 were all within a paper bag in the bathroom. There also was a white garbage style bag involved. I do not recall which, if any, or all of the Exhibits 1,2, or 3 were also within the white plastic bag. The paper bag was, however, the outer most container."

"14. Exhibits No. 4 and No. 9 were found inside brown paper bags which were near the television set, and the cocaine in these two Exhibits was also

concealed from view by the paper bags. We could not determine what was inside the bags *until* we opened the opaque packaging. As indicated in paragraph 2, we were called to investigate suspected narcotics. We opened the opaque packaging to learn what was inside, and as a result, we found the cocaine."

"15 a. Exhibit No. 4 was packaged as follows: The cocaine was inside two ziplock plastic bags; these were then inside a brown paper grocery bag, which was in turn, inside another brown paper grocery bag."

"15 b. Exhibit No. 9 was packaged as follows: The cocaine was inside two plastic ziplock bags; these were then inside at least one brown paper bag."

Sgt. Schlueter's report of 10-29-83 documents the search of five cocaine-containing containers. (In appendix).

At item #**1: "large paper bag".** At #2 **"manilla envelope".** At #3 **"manilla envelope".** Following item #3 there is an *. **"* Items #1, #2 and #3 found in "Winn Dixie" paper bag in bathroom."** At item #4 **"small paper bag inside large "Super V" paper bag. Found on the floor under the television."** At item #9 **"found in small paper bag on floor under television."** [3]

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[3] J. Montgomery's order denying Larson's coram nobis, dated 2-6-03, states: "..the affidavits from the police officers do not affirmatively prove that all of the cocaine was hidden from view." P.5. However, the district court referenced only part of paragraph 13(a). After the words "..inside a manila envelope" Holden said "The trial transcript is not clear on this point." The district court's incomplete reference is "a stab in the air" in the face of the sworn facts. Her statement is incomplete, taken out of context, and misleading because the foundation for paragraph 13 is in paragraphs 1-12. Paragraph 13(a) of both Holden's and Schlueter's affidavits reference Exhibit No. 1. The trial transcript momentarily aside, the fact that items #1, #2 and #3 were all CONCEALD FROM VIEW inside a "Winn Dixie" paper bag, whether ex. No. 1 was inside a manila envelope or not, **is the legally relevant turning point**. All three items

Larson filed another 2255 which was denied as successive. J. Murphy stated at p.3 of her order of 7-22-94 that the "new affidavits do not provide any information that had not already been considered". This is incorrect because the police officers' affidavit testimony swearing the cocaine was concealed from view inside closed containers **had never been put into the files and records of the case**. While the "container issue" "**ground**" had been considered previously, it had never been considered with the benefit of the police officers' specific and direct testimony as to whether the cocaine was all concealed from view inside the containers when the police discovered it. The files and records of the original case were the only information considered previously by the district court. J. Murphy went on to say "Even if the evidence were new, it would not be grounds for

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were **CONCEALED FROM VIEW**. Due to the "Winn Dixie" bag, **the presence, or absence, of a manila envelope for Ex. No. 1 is legally irrelevant.** Nevertheless, the trial transcripts **do reveal there was a manila envelope contained in Exhibit No. 1.** T.T. 340 lines 6-8: AUSA questioning Holden:

"Q. And those bags, are they contained in Government Exhibit 1 for identification, that exterior envelope that have your name on them? A. "Yes." T.T.340 lines 16-19; A. "Item number 2 has also been marked by me with the case file, the date, the time, and my name on the outside bag, which was sealed." T.T. 341 lines 3-16; Q. "Now, tell us how Government Exhibit 2 for identification, or the contents of Government Exhibit 2 for identification, were **found by you to be wrapped when you found them in the grocery bag." A. "The powder was bagged inside the zip-locked bags here as was item number 1. The bag was inside the manila envelope." Q. "So there's a manila envelope also contained in government exhibit 2? A. Yes there is.** Q. "And the zip-lock bag with powder was inside that?" A. "Yes." Q. "Was the manila envelope inside another bag?" A. "Yes." **T.T. 345 lines 19-25; Q. "Now, let's go back to items 1, 2, and 3. Would you show us, by putting the numbers 1, 2, and 3, where you found them? (The witness complied.) Q. "And again, those were all in one container, is that correct?" A. "That's correct."**

habeas relief absent a showing that it would probably produce an acquittal on retrial. Mastrian v. McManus, 554 F.2d 813, 823 (8th Cir. 1977)". It is important that J. Murphy stated the "new affidavits" do not provide any "information" that had not been considered. Yet, there is new "information" in the affidavits that has not been considered. "Information" was used to mean "grounds", as "grounds previously considered" is defined at 28 USC 2255 Rule 9(b).

However, the next sentence states that even if the new information contained in the new affidavits were **"new evidence"** it would not be the basis for relief on habeas citing to the ancient case of McManus. This is a situation of "being correct, but for the wrong reason". The correct law to cite would have been Sawyer v. Whitley, 505 U.S. 303 (1992) because the new affidavits contained new information that conclusively proved a constitutional violation, but they did not make a showing of actual innocence. The ancient law of McManus applied to "newly discovered evidence", which by definition the police affidavits were clearly not "newly discovered evidence".[4] By 1993, because of the

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[4] In order to clearly make a distinction between "new evidence", "newly discovered evidence", and the police affidavits, which expanded and developed the record as it existed in 1983, Larson will not refer to "new evidence" or "newly discovered evidence" herein. Larson will not do this so as to prevent any confusion of "new affidavits" with "new evidence" or "newly discovered evidence". The 1993 affidavits are **not** "newly discovered evidence" because "newly discovered evidence" is defined to be evidence "discovered after the trial, not discoverable before the trial by exercise of due diligence." Black's Law Dict., 5th ed. 1979. The police officers' testimony as stated in the affidavits could have easily been discovered by Larson's attorneys through due diligence. Moreover the testimony of the police officers as stated in the affidavits could also have been learned by the district court had it granted an evidentiary hearing as was required by 28 USC 2255. Also in the interest of avoiding confusion, Larson will not make any reference to "new, or newly discovered evidence" so as to avoid the 1996 amendment to habeas which requires that "newly discovered evidence" must essentially meet the "actual innocence" standard. Rather Larson will refer to the police affidavits meaning sworn testimony that developed the files and

police affidavits, Larson could finally show conclusive proof that his conviction was the result of a Constitutional violation but Larson could not show actual innocence. Consequently, J. Murphy had no choice but to deny the 2255 as successive. Larson was left with no remedy until after his release from parole in 1995.[5] After Larson's release Larson filed a coram nobis. In an unpublished opinion the 8th Circuit held:

> "We agree with the district court that Mr. Larson has not shown he is entitled to coram nobis relief, because he unsuccessfully raised on direct appeal and in prior 28 USC 2255 motions the 4th Amendment and ineffective-assistance-of-counsel claims that he raises here. ..coram nobis petitioner not entitled to review of issues that were considered and resolved **EITHER** on direct appeal **OR** in 2255 motion..".

The facts are that the police officers' sworn testimony has never been put in issue or passed upon. The district court never considered anything outside the files and records of the original case, but the original case did not contain the police officers' affidavit testimony on the

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records as they existed in 1983. The affidavits themselves state the affidavits are true and the evidence therein was in existence in 1983, and further the police officers will so testify. See paras 18. These affidavits are testimony, gathered outside the courtroom that could have been elicited in 1983. The facts were known, and available, in 1983, they were just not fully developed until 1993. This is **not to say** that because Larson knew the facts, he also knew the law and waived the container issue. Larson had no law education in 1983 and he was unaware of the significance of the relevant facts. Townsend v. Swain, 372 U.S. 293, 317 (1963): "..if for some reason he was previously unable to assert his rights or was unaware of the significance of relevant facts, it is neither necessary nor reasonable to deny him all opportunity of obtaining judicial relief."

[5] Larson completed his sentence when he was released from parole on 11-13-95. Discharge order in appendix. J. Montgomery's order dated 2-26-03 incorrectly stated at p.4 that Larson completed his sentence in August 1991.

container issue. By 1993 a successive 2255 could not be entertained unless it showed both a constitutional violation and actual innocence. The district court could not legally have put the police affidavits' testimony in issue and passed upon them to show an illegal container search. It had no choice but to dismiss the 2255 as successive. **HOWEVER, it is absolutely remarkable that the 8th Circuit itself uses U.S. v. Larson, 760 F.2d 852 (8th Cir.1985)** to hold for the very law that Larson has been arguing on 2255 for 18 years to no avail. That is that the police had authority to search the room, but not to search Larson's containers. See U.S. v. Pierson, 219 F.3d 803, 806 (8th Cir.2000):

> "Although the officers' entry into the room was lawful on the basis of exigent circumstances, it does **not legitimate the subsequent search of the garment bag**. ..Such an entry must be "limited in scope to the minimum intrusion necessary to prevent the destruction of evidence." ..Once the officers had Pierson and Conklin under control, there was no reason for the officers to believe that evidence was in imminent danger of removal or destruction. See ***United States v. Larson, 760 F.2d 852, 855 (8th Cir.1985).***"

The U.S. District Court's basis for jurisdiction was 28 USC 1651.

QUESTION I.

Considering the facts of this case, where a federal criminal conviction resulted **because** "*errors in matters of fact which had not been put in issue or passed upon, and (where those facts) were material to the validity and regularity of the legal proceeding itself*", and where those facts could have been put in issue and passed upon in Larson's first 2255's, but for the district court's refusal to conduct an evidentiary hearing, and where this Court changed the rules for successive 2255 writs in Sawyer v. Whitley, 505 U.S. 333 (1992) so as to preclude Larson from

ever putting those material facts in issue on a successive 2255, thereby leaving Larson with no remedy after Larson had *gathered the factual proof of his unconstitutional conviction by other means*, it cannot still be said today, as this Court stated in U.S. v. Smith, 331 U.S. 469, 475-6 & n.4 (1947) that because of the safeguards of the F.R.Cr.P. the possibility of an "**unredressed injustice**" is so remote that "it is difficult to conceive of a situation in a federal criminal case today where" the coram nobis "remedy would be necessary or appropriate".

The Constitution abhors a "no remedy vacuum" for fundamental rights violations. See Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803).

> "The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. ...The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, **if the laws furnish no remedy** for the violation of a vested legal right."

The only known remedy for correcting a constitutional violation after release from incarceration is coram nobis, however the 8th Circuit has now held that if a party has raised his issue either on direct appeal or by 2255, the coram nobis remedy is forfeited. This is not the law of this Court. Moreover, the 8th Circuit's reasoning is flawed both in fact and law, as is discussed fully in Question #2. This Court had sound reasons for limiting successive 28 USC 2255 motions. By doing so it "ripened" the reserved issue left open in U.S. v. Smith, 331 U.S. 469, 475 & n.4 (1947). The change of the law regarding successive 2255 motions now makes the possibility of an "unredressed injustice" a very real possibility indeed. Previously the safeguards of the F.R.Cr.P. allowed for facts outside the record (i.e. not "newly discovered evidence" but facts outside the record not previously put in issue or passed upon)

to be raised by successive 2255 motions. E.g., facts that were outside the record but which were necessary to a finding on the merits could be brought by successive 2255 motion. Sanders v. U.S., 373 U.S. 1, 19-20 (1963).

> "But the denial (of the first motion) was not on the merits. ..To be sure, the district judge stated: .."The Court has reviewed the entire file . . . which includes the previous proceeding, and a transcript of the proceedings at the time petitioner entered his plea, and . . . is of the view that petitioner's complaints are without merit in fact." But the "files and records of the case," including the transcript, could not "conclusively show" that the claim alleged in the second motion entitled the petitioner to no relief. ..For the facts on which petitioner's claim in his second application is predicated are outside the record. ...That the judge may have thought (the files and records of the case) "conclusively show(ed)" as the statute requires, that there was no merit in his present claim" (the statute requires that the files and records do in fact "conclusively show" that there is no merit). "On remand, a hearing will be required." Machibroda v. U.S., 368 U.S. 487, 494-5 (1962). "This was not a case where the issues raised by the motion were conclusively determined either by the motion itself or by the "files and records" in the trial court. The factual allegations contained in the petitioner's motion and affidavit, and put in issue ..related primarily to purported occurrences outside the courtroom and upon which the record could, therefore, cast no real light. Nor were the circumstances alleged of a kind that the District Judge could completely resolve by drawing upon his own personal knowledge or recollection."

In the instant case the district court did not reach the merits of the container issue and denied an evidentiary

hearing on all 4 of Larson's 2255 motions because it believed the files and records "indicated" that both the motel manager and the police discovered cocaine in plain view. "Even **if** the court **were** to reach the **merits** of the container issue, the record ***indicates*** at least some of the cocaine was in plain view rather than in closed and opaque containers." Order of 7-2-87, p.7. "Indicates" does not mean "conclusively shows" as required by 28 USC 2255. On Larson's second 2255 motion it, again without an evidentiary hearing, found (*on the merits; yet relying only upon the files and records*) that the motel manager had not seen cocaine afterall. However the direct testimony of the police officers as to where they discovered the cocaine was not in the "files and records", at least not sufficiently to make clear that the cocaine was concealed from view inside closed containers. The police officers themselves state in their affidavits that they used the "files and records" of the case to refresh their memories and thereafter swore under oath that the files and records were true, and these confirmed their memories that the cocaine was concealed from view inside closed containers which they opened for the sole purpose of determining what was inside of the closed containers. Consequently, the district court could not have found the files and records "conclusively showed" "plain view" without the aid of direct testimony from the police officers. Since the district court refused to allow an evidentiary hearing at any time on Larson's 2255 motions the record was simply not complete, and could not therefore "conclusively show" there was no merit to the container issue. In 1993 Larson obtained the police affidavits, but due to the change in law, Sanders was no longer sufficient unless Larson could also show his actual innocence. Larson could not show actual innocence because Larson was guilty. Therefore the 2255 remedy was lost forever to Larson. Because the new laws require both a constitutional violation and actual innocence there are certainly many prisoners who have gathered facts from outside the record, which proves an

unconstitutional conviction, but not actual innocence, and therefore they cannot use theses facts to vacate their conviction because the 2255 would be successive. Or, for some cases after the 1996 amendment to 28 USC 2255 their motions would be untimely if filed after 1 year. These prisoners, as Larson was, are left with no remedy until after their release. Thereafter coram nobis is their **only remedy.**

If this Court does not reaffirm coram nobis, these citizens will be in a "catch 22" situation. After release the new rules for 2255 motions no longer apply, but they cannot file a 2255 because they are no longer incarcerated. Yet if they were incarcerated they could not file a successive, or untimely, 2255 because of the new rules. In some instances, such as the instant case, **this leaves no remedy** for correcting an "unredressed injustice".

Now, to make matters even more hopeless, the 8th Circuit would remove the coram nobis remedy by incorrectly giving res judicata effect to prior 2255's. The 8th Circuit would for all practical purposes remove coram nobis in total, for it is a rare convict that does not file a 2255. Where a constitutional issue is at stake, and where there are errors in matters of fact which have not been put in issue or passed upon a decision to remove the coram nobis remedy by giving res judicata effect to prior 2255's is far too important a decision to be left up to any court; except the U.S. Supreme Court. No longer is the possibility of an "unredressed injustice" so remote that "it is difficult to conceive of a situation in a federal criminal case today where" the coram nobis "remedy would be necessary or appropriate". The instant case is real. It need not be imagined. If there is one case of "unredressed injustice" with no remedy, as the instant case is, then surely there are many more cases that presently exist, or that will arise in the future.

This Court has always held that the Constitution will provide a remedy for a constitutional violation. This Court abhors a "no remedy vacuum" (absent waiver; delay resulting in prejudice; and various other factors not present

here) as this Court stated two hundred years ago in Marbury v. Madison. This Court alone is qualified to settle this very, very important question of law.[6]

This Court could decide that furnishing a remedy for a vested right is no longer necessary to the integrity of the United States and a Constitutional violation may stand "unredressed" because there is no remedy available. Or it can decide that the ancient writ of coram nobis is the "last stand remedy". No doubt the burden is high for the extraordinary writ of coram nobis, but the burden is high for any extraordinary writ. Habeas itself is an extraordinary writ, as is mandamus, yet these extraordinary remedies have existed for centuries. The question for this Court is: 1.) Does the writ of error coram nobis still exist? And, 2.) If it does, can the effect of res judicata from a prior 2255 motion forfeit coram nobis? The current law is that res judicata is inapplicable to 2255's; discussed further in Question #2.

Whatever this Court decides, **this important question of law is "ripe" for decision**; it has been reserved by this Court for decision since 1947; and it should be settled and decided by this Court, not by the Circuit courts. The question is far too important because coram nobis has roots in antiquity. The 8th Circuit has decided a question that this Court has specifically reserved for itself, and it did so without the proper in-depth analysis that the question deserves.

QUESTION II.

A. The 8th Circuit incorrectly states the rule of law for coram nobis and directly conflicts with this Court's holdings in Morgan on 2 points of law. In Morgan his Court held:

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[6] The fact that the 8th Circuit's opinion is unpublished does not, in this day of internet access, automatically consign the 8th Circuit's incorrect statement of law to an inaccessible compartment of "secret law" never to be seen again. The opinion is easily accessible, and while the opinion itself may not be cited in all Circuits, its reasoning can be repeated and incorrectly applied by citing to the 2 published cases cited in the opinion thereby deciding cases based upon the incorrect statement of law.

> "Continuation of litigation after final judgment and exhaustion or waiver of **ANY** statutory right of review should be allowed through this extraordinary remedy (of coram nobis) only under circumstances compelling such action to achieve justice. There are suggestions ..that the facts that justify coram nobis procedure must have been unknown to the judge. ...Such an attitude may reflect the rule that deliberate failure to use a known remedy at the time of trial may be a bar to subsequent reliance on the defaulted right." P. 511. ...In the Mayer case this Court said that coram nobis included errors "of the most fundamental character. ..Where it cannot be deduced from the record whether counsel was properly waived, we think, no other remedy being then available and sound reasons existing for failure to seek appropriate earlier relief, this motion in the nature of the extraordinary writ of coram nobis must be heard by the federal trial court. **Otherwise a wrong may stand uncorrected which the available remedy would right."** P. 512.

The first statement of the rule of law that is in conflict with Morgan is the 8th Circuit's holding that claims previously raised on direct appeal bar coram nobis relief. A "statutory right to review" includes "a direct appeal". While this Court stated compelling circumstances would be required if there were either a "waiver" or an "exhaustion" of a direct appeal, this Court does not deem either a "waiver" or the "exhaustion" of a direct appeal to be an absolute bar to coram nobis as the 8th Circuit states. This Court has a long history of protecting constitutional rights and of holding that an unconstitutional conviction may be remedied at any time.[7] This Court has held that one constitutional right will not be

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[7] Unless there has been a knowing waiver of his constitutional right by the criminal defendant; or delay to the detriment of the opponent; etc. These issues are set aside here because they do not apply to the instant case.

surrendered in order to assert another. Simmons Et Al v. U.S., 390 U.S. 377, 394 (1968). This Court has distinguished a federal court unconstitutional 4th Amendment violation holding that it will be reversed in order to uphold the integrity of the federal court (Elkins v. U.S., 364 U.S. 206, 222 (1961)), even where a state court 4th Amendment violation would not be corrected. Stone v. Powell, 428 U.S. 465, 489-496 (1976). This Court has called the Constitution a living, breathing Constitution. This Court has long held that the nature of the Constitution is to abhor a vacuum; i.e. where a constitutional right is in issue the constitution controls and it will fill the void where no remedy appears to exist. "Otherwise a wrong may stand uncorrected which the available remedy would right." Morgan, p. 512.

The 8th Circuit has now incorrectly stated the law of coram nobis, and also of this Court. It did so by making errors of both fact and law, but it has nevertheless misstated the law such that it incorrectly teaches, in direct conflict with this Court, that a coram nobis remedy is lost if its issue was raised previously on either direct appeal, or by 2255 while incarcerated. The 8th Circuit incorrectly states that this bar is absolute. It does not allow for the compelling circumstances required in order to achieve justice as stated in Morgan. The 8th Circuit so held in the instant case despite clear proof of the absence of a full and fair opportunity to be heard on 2255, and despite the change of the law that prevented Larson from any further hearing on the material errors of fact by 2255 motion. And it did so despite the fact that the police affidavits, which have never been put in issue or passed upon conclusively prove a 4th Amendment Constitutional violation. An "unredressed injustice" of a Constitutional nature.

Moreover, while the facts of the instant case are that the issues raised on direct appeal were different from those raised on 2255 and coram nobis, and therefore the opinion's direct appeal bar to coram nobis does not apply to the instant case, it is not clear that the 8th Circuit's stand that coram

nobis is precluded by issues that were raised on direct appeal is consistent with this Court's past holdings. This Court recently let stand the decision of Brown v. Allen, 344 U.S. 443, 458 (1953) (state court judgment of conviction is not res judicata on federal habeas). It did so because the facts in Wright v. West, 505 U.S. 277 (1992) were so strong as to provide no reason for this Court to revisit Brown. From this, a logical conclusion can be made.

Since a 2255 is "substantially equivalent" to a 2254 motion, and since a 2255 or 2254 motion is "substantially equivalent" to a coram nobis, then if the prior direct appeal of a state conviction is not entitled to res judicata for a 2254 motion, then it likewise would not apply to a coram nobis, because a coram nobis is "substantially equivalent" to a habeas corpus (i.e. a 2255 or 2254).

By this logic, the 8th Circuit is also in conflict with Brown because it gives res judicata status to a federal direct appeal in order to preclude a coram nobis remedy. The 8th Circuit's opinion has painted with a very broad brush to exclude the coram nobis remedy for a large class of citizens with the simple statement: "coram nobis petitioner not entitled to review of issues that were considered and resolved **EITHER** on direct appeal **OR** in 2255 motion.." (The errors of law and fact of the instant case momentarily aside).

In the final analysis, the 8th Circuit's opinion directly conflicts with this Court's decisions, as well as conflicting with every Circuit that follows this Court, but additionally it also directly conflicts with itself regarding res judicata for a 2255. Camacho, infra.

B. (i). Regarding Larson's "direct appeal" the 8th Circuit's incorrect statement of the rule of law for coram nobis is based upon numerous errors of both law and fact. Direct Appeal: (Fact): On direct appeal the 4th Amendment claim raised by Larson's lawyers was that Larson retained a "reasonable expectation of privacy in the **motel room**" that Larson was occupying, but for which he had not paid the rent for the day. U.S. v. Larson, 760 F.2d 852 (8th Cir.1985). In

Larson's 2255 motions and in his coram nobis Larson raised the 4th Amendment claim of a "Reasonable Expectation of Privacy in his Personal Effects" (his containers), and "Ineffectiveness of Counsel". There is law that a claim presented on direct appeal and rejected on the merits is binding. E.g. "..(W)hen a matter has been decided adversely on appeal from a conviction it cannot be litigated again on 2255 motion." Odom v. U.S., 455 F.2d 159, 160 (9th Cir.1972) quoted in U.S. v. Scrivner, 189 F.3d 825, 828 (9th Cir.1999). Larson did not, and presumably could not, have argued successfully on 2255 the same "motel room facet" of the 4th Amendment that had already been decided on the merits on direct appeal. (Law): Larson could not have raised the "container issue" on direct appeal because his lawyers had waived that issue pretrial by not recognizing the issue and moving to suppress the evidence based upon the container issue. U.S. v. Neumann, 887 F.2d 880, 885-6 (8th Cir.1989) (en banc) (A different "facet" of the same 4th Amendment suppression issue is nevertheless a new and independent ground which was not raised pretrial and was therefore waived per Rule 12(b)(3) & (f)).

The Magistrate's R&R for the 1st 2255 stated: "Larson failed to raise the container search claims by pretrial motion. ..Larson's failure to make a pretrial suppression motion claiming that containers were illegally searched resulted in a waiver of that defense. F.R.Cr.P. 12 (b)(3) and (f). U.S. v. Ostertag, 619 F.2d 767, 771 n.3 (8th Cir.1980) (citing U.S. v. Johnson, 614 F.2d 622 (8th Cir.1980)." pp. 12-13. Adopted by the district court on 7-2-87, p.5-7.[8]

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[8] This waiver is persuasive proof that Larson's attorneys were unaware, pretrial, of the container issue law of U.S. v. Schleis, 582 F.2d 1166, 1172 (8th Cir.1978) (en banc); U.S. v. Place, 462 U.S. 696, 701-2 (1983); and Ross, supra. This shows ineffectiveness of counsel. Effective counsel is a fundamental right per the 6th Amendment. Strickland v. Washington, 466 U.S. 668, 694 (1984). Failure to suppress pretrial, the only evidence that is used to convict a defendant at trial, is ineffectiveness of counsel. U.S. v. Johnson, 707 F.2d 317, 320, 323 (8th

(Fact): Larson's attorneys did not raise ineffectiveness of counsel against themselves. Larson, supra. (Law): Larson could not have raised ineffectiveness assistance of counsel on direct appeal because that issue was "..not ripe for review on direct appeal because no record was made on the issue before the District Court." U.S v. Blumeyer, 114 F.3d 758, 771 (8th Cir.1997). While the 8th Circuit has stated the rule of law for coram nobis in direct conflict with this Court as to direct appeal, after the factual errors are removed from the instant case, there could be no "direct appeal" bar to coram nobis for this case because the claims raised on 2255 and in the coram nobis were not the same claims as those raised on direct appeal.

(ii). The second statement of the rule of law for coram nobis that is in direct conflict with Morgan is the 8th Circuit's holding that claims previously raised on 2255 motion bar coram nobis relief. Like a "direct appeal" a 2255 motion is also a "statutory right of review". Per 28 USC 2253(a): "In a habeas corpus proceeding or a proceeding under section 2255 before a district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit in which the proceeding is held". Since Morgan does not rule out the "continuation of litigation (by coram nobis) after final judgment ..of **ANY** statutory right of review" but rather requires that the coram nobis remedy be applied "only under circumstances compelling such action to achieve justice" the 8th Circuit's holding directly conflicts. Morgan states that coram nobis is an "extraordinary remedy", just as is a 2255.

> "In U.S. v. Hayman, 342 U.S. 205, 219, we stated the purpose of 2255 was "to meet practical difficulties" in the administration of federal habeas

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Cir.1986). **A petitioner is entitled to coram nobis relief if he can show ineffectiveness of counsel.** U.S. v. Castro, 26 F.3d 557, 559 (5th Cir.1994); U.S. v. Drobny, 955 F.2d 990, 996 (5th Cir.1992)("**Under Morgan" .."ineffectiveness of counsel" meets "the rigorous standards of coram nobis. Morgan, 346 U.S. at 512").**

corpus jurisdiction. We added: "Nowhere in the history of Section 2255 do we find any purpose to impinge upon prisoners' rights of collateral attack upon their convictions." We know of nothing in the legislative history that indicates a different conclusion. We do not think that the enactment of 2255 is a bar to this motion, and we hold that the District Court has power to grant such a motion." Morgan, p. 511.

U.S. v. Hayman, 342 U.S. 205, 217-218 (1952) states:

"This section (28 USC 2255) applies only to Federal sentences. It creates a statutory remedy consisting of a motion before the court where the movant has been convicted. The remedy is in the nature of, but much broader than, coram nobis. The motion remedy broadly covers all situations where the sentence is `open to collateral attack.' As a remedy, it is intended to be as broad as habeas corpus."

Constitutional rights can be asserted by many different extraordinary remedies. A habeas corpus is an extraordinary remedy, as is mandamus, yet these extraordinary remedies may be used to vacate unconstitutional convictions and correct unconstitutional acts. A habeas can release a person from custody because of an unconstitutional conviction, yet it cannot and does not, decide guilt. A mandamus can be used to enforce a plea agreement at any time that the plea agreement is in existence. Heflin v. U.S., 358 U.S. 415, 420 (1959) states: "**Section 2255** provides that: ..A motion for such relief may be made at any time. This latter provision simply means that, as in habeas corpus, there is no statute of limitations, **no res judicata**, and that the doctrine of laches is inapplicable." Heflin is no longer correct "in the letter" as to the statement that a 2255 "may be made at any time" because there are new rules that require a 2255 motion to be made within a

time period. However, "in the spirit" it states what this Court has held for many years. That nothing can bar the assertion of a Constitutional Right. A Constitutional right can be asserted and unredressed injustice corrected at any time **by one extraordinary writ or another.**

The Spirit of the Law, and the words of the U.S. Constitution says this unconstitutional conviction can be removed. Morgan, Hayman, Heflin, and Marbury all stand for this "spirit". Yet the 8th Circuit conflicts with "the spirit" of the Supreme Court law and states because Larson raised his issues on 2255 he is now barred from raising them on coram nobis. This is a clear misstatement of the law of coram nobis, in conflict with both Supreme Court law, and with the Spirit of Constitutional Law.

The partial closing of the "successive 2255 door" by this Court was not meant, and must not be construed to mean, that all remedial doors closed with the partial closing of that door. (The successive 2255 door partially closed because both a constitutional violation and actual innocence must be shown to justify a successive 2255). Rather, in the interest of justice the partial closing of the successive 2255 door must serve to open wide the coram nobis door, otherwise, there is no remedy for some. "Otherwise a wrong may stand uncorrected which the available remedy would right." Morgan, p.512. The instant case is an example of a set of facts that display a fundamental right has been violated, and through no fault of Larson's, Larson has been left with no remedy to correct this unredressed injustice. Unless this Court reaffirms its holding in Morgan, the 8th Circuit has removed the coram nobis remedy for an unknown number of citizens in similar situations. The partial closing of the 2255 door was done to limit the numbers of successive 2255's. This Court is aware that almost all convicts file a 2255. But the partial limitation on 2255's was never meant to deprive federal convicts of Due Process, or the opportunity to correct an unconstitutional conviction. The mechanics are that in many cases the sentence must now be

served before coram nobis can be asserted due to the 2255 limitations, but as Morgan held at p.511: "Nowhere in the history of Section 2255 do we find any purpose to impinge upon prisoner's rights of collateral attack upon their convictions."[9] The 8th Circuit has now held that those who do use 2255 while incarcerated will lose their coram nobis remedy after their release. This Court did not intend for that. The 8th Circuit has, without sufficient regard for law or facts, given full res judicata effect to 28 USC 2255. Heflin v. U.S., 358 U.S. 415, 420 (1959) specifically states that 2255, like habeas corpus, is not subject to res judicata. The 8th Circuit was aware of this. See U.S. v. Camacho, 94 F.3d 1168, 1172-3 (8th Cir.1996) ("..it is well settled that ..res judicata ..is .. inapplicable" to 28 USC 2255 motions). As with the "direct appeal" misstatement, the opinion below conflicts with, and misstates the law because the opinion both misstates the facts of its own 8th Circuit case, and it also conflicts with its own 8th Circuit law. The opinion cites Azzone v. U.S., 341 F.2d 417-20 (8th Cir.1965) to hold that a "coram nobis petitioner (is) not entitled to review of issues that were considered and resolved **either** on direct appeal **or** in 2255 motion." However, the opinion misstates the facts of Azzone, and this results in an incorrect statement of law. The facts in Azzone (p.419) are that the 8th Circuit considered 5 different allegations presented by Azzone on coram nobis.

> "Inasmuch as any relief to which appellant may be entitled is not available through § 2255 or habeas corpus proceedings, we believe that appellant's

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[9] See Townsend v. Swain, 372 U.S. 293, 317 (1963). It is interesting to note that a habeas originally placed emphasis on the constitutional violation, **not innocence**. This underscores the importance of the Constitution. While habeas has added new rules, these rules are not Amendments to the Constitution. The Constitution has no less importance today than it did in 1963. The only remedy that is used to enforce the Constitution that comes into play after release from incarceration is coram nobis.

motion is entitled to be treated as an application for a writ of error coram nobis, and accordingly pass to the question whether the allegations relied upon are such as to merit a hearing thereon."

Azzone then held that "Contention No.1" was "considered and resolved by us in the appeal ..and ..is not entitled to another review of that issue." P.419. "Contention #'s 2,3, & 4 were found "frivolous"; "beyond credulity"; and "coram nobis may not be used as a substitute for an appeal" as to jury instructions, respectfully. P. 419. On "Contention No.5" Azzone states: "We held in our opinion on the appeal on the merits, that the statute was neither ambiguous nor unconstitutional. ..The issue was again resolved against appellant in his first § 2255 motion. ..He is not entitled to another review of this question." P.420.

The properly stated holding of Azzone is that where the same claims had been considered and resolved on the factual and legal merits on direct appeal **(or on BOTH** direct appeal **AND** on 2255) they would not be reviewed again. Azzone held that the same claims that had been fully adjudicated on direct appeal would not be reviewed again because the **direct appeal decision was critical.** The fact that "Contention No.5" had also been adjudicated again on 2255 was mere surplus. The fact that the same issue had been considered again on 2255 added nothing to the holding of Azzone because had "Contention No. 5" not already been considered again on 2255 Azzone would not have reviewed it on coram nobis for the same reason that "Contention No.1" was not reviewed on coram nobis. "The question ..was considered and resolved by us in the appeal ..and appellant is not entitled to another review of that issue." P. 419. The **direct appeal resolution of the same issue was critical, not the 2255 motion.**

Most importantly, in the instant case, Larson did not raise the same issues on 2255 that he had on direct appeal. Additionally, because a coram nobis is substantially equivalent to a 2255 motion, see infra, if Larson had raised

the "container issue" and "ineffective counsel" on direct appeal and those issues had been resolved on the merits, (this Court's holding in Morgan, momentarily aside) Larson would not reasonably expect to prevail on the same issues on coram nobis that had been resolved on direct appeal. However, that is not the situation in Larson because Larson did not raise the same issues on direct appeal. The unpublished opinion below misstates Azzone to hold that if the claim was considered and resolved on **either** direct appeal **or** 2255 then either one will bar coram nobis. This is not the holding of Azzone. Nor is it the rule of Morgan.

C. Applying the law to the facts of the instant case, Larson's prior direct appeal is not a bar to coram nobis both because the issues are not the same, and also because Morgan does not apply a strict bar to coram nobis based upon a prior appeal, even if the issues were the same. Applying the correct holding of Azzone to the instant case proves that Azzone does not say that an issue raised on 2255 is a bar to coram nobis, and neither does Morgan.

While a prior direct appeal considered and resolved on the merits would bar a coram nobis (i.e. per Azzone, but not according to Morgan), before a prior 2255 motion could be a bar to coram nobis it would require a full and fair opportunity to be heard on the merits as required by the 5th Amendment Due Process Clause, which Larson has never had, but moreover it also would require that the doctrine of res judicata apply to a prior 2255 motion. Yet the 8th Circuit itself held in Camacho "it is well settled that, in habeas cases, res judicata is subsumed under the equitable abuse of the writ doctrine, and is therefore inapplicable. See, e.g., Wong Doo v. U.S., 265 U.S. 239, 240-1(1924) (successive petitions for writ of habeas corpus do not turn on the "inflexible doctrine of res judicata," but rather on whether the successive petition constitute an abuse of the writ)." P. 1173. Heflin and Sanders also held res judicata did not apply to 2255 motions.

Camacho also states: "..coram nobis relief is "substantially equivalent" to habeas corpus relief, n6 U.S. v. Little, 608 F.2d 296, 299 (8th Cir.1979); see also U.S. v. Morgan, 346 U.S. 502, 506 n.4 (motion for writ of coram nobis "is of the same general character as one under 28 USC § 2255")..". Applying law and logic to the question of whether the same issues raised in prior 2255's are barred by res judicata from being raised on coram nobis the syllogism becomes: (1.) res judicata does not apply to 2255 motions. (2) Coram nobis and 2255 motions are "substantially equivalent", and because they are "substantially equivalent" Camacho held that res judicata does not apply to a successive coram nobis. (3.) Therefore, res judicata cannot apply to a 2255 in order to serve as a bar to a coram nobis just as res judicata cannot apply to a 2255 to bar a successive 2255.

Camacho also discussed "law of the case" as a bar to a second coram nobis. At footnote 7: "The government also contends that the arguments raised in the second petition are governed by the law of the case. In light of **the new evidence raised**, we conclude that the law of the case doctrine is inapplicable." Again applying logic, if new evidence which has never been put in issue or passed upon can be raised in a second coram nobis, then logically Larson's police affidavits can be raised in a first coram nobis. [10]

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[10] The "new evidence" in Camacho is similar to the new information in the instant case. As discussed herein "new evidence" takes many shapes and is cited at different times to mean different things. In Camacho a plea agreement promised that the government would recommend against deportation of Camacho. The government decided to deport Camacho. Camacho appealed to the 8th circuit, and also sought a temporary stay of deportation. The INS filed a memorandum in opposition to the stay. Camacho was deported. Then Camacho filed his 1st coram nobis stating the government had failed to honor the plea agreement. The district court dismissed the petition holding Camacho had presented no evidence regarding the inability of the government to fulfill its promise. Camacho filed a 2nd coram nobis "for consideration of new evidence". This new

QUESTION III.

28 USC 2255 Rule 9(b) defines "Successive" as:

> "A second or **"successive"** motion may be dismissed if the judge finds that it fails to allege new or different grounds for relief and the prior determination was on the merits.." (and the definition of "Abusive" as:) "..or if new and different grounds are alleged, the judge finds that the failure of the movant to assert those grounds in a prior motion constituted an **"abuse"** of the procedure governed by these rules."

After sorting out the errors of law and fact the opinion below essentially holds that if the same claims brought on coram nobis were previously brought by 2255 motion, then the coram nobis is "successive" just as if the coram nobis were another 2255 motion. The unpublished Larson opinion also implies that Camacho holds that a claim brought successively from a prior 2255 motion is an abuse of the writ. (This implication ***blurs*** the meaning of "successive" and "abusive" to the point of not making sense). Nevertheless, that is ***not*** what Camacho holds. Camacho holds that because coram nobis is substantially equivalent to a 2255 motion, then the same "successive /

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evidence was the INS's memorandum opposing Camacho's stay of deportation. The 8th Circuit held that because of this "new evidence" the coram nobis was not successive and the law of case did not apply. As in the instant case, the court had heard Camacho's "grounds" before but held there was no evidence to prove breach. When Camacho presented documented evidence in the form of the INS memorandum the court called it "new evidence". (The 8th Circuit also cited new law holding that the government binds all agencies; however this Court had made that holding in 1971 in Santobello v. N.Y., 404 U.S. 257). By comparison, Larson had raised his container issue grounds before the same J. Murphy for many years. Larson's "new information" in the police affidavits is "new evidence" (in the Camacho sense) inasmuch as they prove the 4th Amendment violation with sworn testimony contained in hard documents, just as Camacho's hard documents proved his point.

abusive" rules that apply to 2255 motions would also apply to coram nobis. In particular Camacho cites Wong Doo to show that where a 2255 petitioner had held back a claim in his first 2255 motion, but then raised it as a "new ground" in his second 2255 motion this was an abuse of the habeas corpus writ. By analogy then Camacho held that if a petitioner raised a new ground in a second coram nobis (which was not supported by "new evidence", but rather one that had been held back on his first coram nobis) then this would also constitute abuse of the coram nobis writ, just as it would for a 2255. But the opinion's troubling "abusive" implication conflicts with U.S. v. Swindall, 107 F.3d 831, 835 & n.7 (11th Cir.1997). And it also conflicts with, and misapprehends, it's own case of Camacho. Swindall states:

> "If Appellant's claim could be maintained under a writ of *error coram nobis*, Appellant would be required to show cause and prejudice for his procedural default. U.S. v. Frady, 456 U.S. 152, 167-8 (1982). n7 We note that Appellant may have abused the writ in not asserting his present claim in his previous § 2255 motion. The abuse of the writ defense applies to a writ of *error coram nobis* successively brought after a § 2255 motion."
>
> Camacho, p. 1173: "See, e.g., Wong Doo v. United States, 265 U.S. 239, 240-41 ..(1924) (successive petitions for writ of habeas corpus do not turn on the "inflexible doctrine of res judicata," but rather on whether the successive petition constitutes an abuse of the writ). We conclude that this principle also applies to coram nobis cases."

Camacho holds that Camacho's 2nd coram nobis, which raised a new ground, would usually be "abusive" on a 2nd coram nobis just as it would be on a 2nd habeas because a coram nobis is substantially equivalent to habeas. Therefore, if a new ground raised in a 2nd habeas would be abusive, a new ground raised in a 2nd coram nobis would be as well. Camacho does not hold that bringing the same issue on

coram nobis, after having raised it on a prior 2255 is either "successive" or "abusive" to a coram nobis. Consequently, per Swindall, and not inconsistent with Camacho, had Larson failed to raise his issues in his prior 2255's, but raised them for the 1st time on coram nobis, the courts would have considered it an "abuse of the coram nobis writ". However, the wording of the opinion implies that the same issue brought on coram nobis that had been raised successively from a 2255 is "abusive". This conflicts with Swindall. This conflict between the 8th and the 11th Circuits appears to be a matter of first impression. Larson's research found that only in n.7 of Swindall is this question discussed directly and correctly, in conflict with the 8th Circuit's incorrect "abusive" implication.[11]

CONCLUSION

Larson asks this Court to: 1. Reaffirm that the coram nobis remedy is available in federal court; 2. Vacate the 8th Circuit's opinion; 3. Grant Larson's coram nobis and vacate Larson's unconstitutional conviction; or 4. Remand to the 8th Circuit with instructions to vacate Larson's conviction.

Respectfully Submitted:

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[11] U.S. v. Esogbue, 357 F.3d 532, (at IV) (5th Cir.2004) also intimates that a coram nobis claim must at least be attempted to be successive to a 2255 claim before it can be brought on coram nobis. (The 5th Circuit further complicates the conflict by holding that per Morgan an ineffective assistance of counsel claim can be brought for the first time on coram nobis and need not be successive to a 2255. Drobny, supra, 955 F.2d 990, 996; Castro, supra, 26 F.3d 557).

U.S. Court of Appeals
For the Eighth Circuit

No. 03-2034

U. S. of America *
*
Appellee, *
* Appeal from the U.S. District Court
v. * For the District of Minnesota.
*
Duane Wendall Larson
Appellant * [UNPUBLISHED]

Submitted: January 20, 2004

Filed: February 6, 2004

Before MORRIS SHEPPARD ARNOLD, BYE, and RILEY, Circuit Judges.

PER CURIAM.

Duane Larson appeals the district court's[1] denial of his petition for a writ of error coram nobis, in which he sought to vacate his drug conviction and sentence (from which he has been released). We agree with the district court that Mr. Larson has not shown he is entitled to coram nobis relief, because he unsuccessfully raised on direct appeal and in prior 28 U.S.C. § 2255 motions the Fourth Amendment and ineffective-assistance-of-counsel claims that he raises here. See Azzone v. United States, 341 F.2d 417, 419-20 (8th

[1] The Honorable Ann D. Montgomery, United States District Judge for the District of Minnesota.

Cir.) (per curiam) (coram nobis petitioner not entitled to review of issues that were considered and resolved either on direct appeal or in § 2255 motion), cert. denied, 381 U.S. 943 (1965); cf United States v. Camacho-Bordes, 94 F.3d 1168, 1172-73 (8th Cir. 1996) (coram nobis relief is "substantially equivalent" to habeas relief, and abuse-of-the-writ principle applies to coram nobis cases (quoted source omitted)).

Accordingly, we affirm.

United States District Court
District of Minnesota

Duane W. Larson
Petitioner

v.

Memorandum Opinion and Order
Criminal No. 4-83-84(1) ADM

U.S. of America
Respondent

Duane Wendall Larson, pro se.

I. INTRODUCTION

Petitioner Duane W. Larson ("Petitioner") brings the instant matter before the undersigned United States District Judge pursuant to his Motion of Application for a Writ of Error Coram Nobis [Docket No. 225] in accordance with 28 U.S.C. § 1651. Petitioner seeks to vacate his conviction and sentence for aiding and abetting possession of cocaine with intent to distribute under 21 U.S.C. § 841(a)(1) and 18 U.S.C. § 2 [Docket Nos. 57, 71]. Petitioner argues that cocaine seized from his hotel room was obtained in violation of the Fourth Amendment because police allegedly seized cocaine from closed containers without a search warrant. Petitioner also claims his lawyers were ineffective for failing to raise the issue of the warrantless container search at trial. Petitioner believes these violations entitle him to coram nobis relief. For the reasons set forth below. Petitioner's Motion is denied.

Filed Feb. 26, 2003
Richard D. Sletten, Clerk

(P.1)

II. BACKGROUND

On February 9, 1984, Petitioner was convicted of possessing with intent to distribute approximately three pounds of undiluted cocaine violation of 28 U.S.C. § 841(a)(1) and 18 U.S.C. § 2 [Docket No. 57]. Petitioner was sentenced to ten years imprisonment and a $25,000 fine [Docket No. 71].[1] The Eighth Circuit Court of Appeals affirmed the conviction, finding that Petitioner did not have a legitimate expectation of privacy in the hotel room where the search took place and that the warrantless search was justified by the exigent circumstances exception. Larson, 760 F.2d at 854-56. The appellate decision affirmed the district court's denial of the motion to suppress the cocaine. Id. at 856.

Following his direct appeal, Petitioner filed four 28 U.S.C. § 2255 petitions challenging his conviction and sentence. The first petition, filed in 1986, sought relief on various grounds, including an allegation that the cocaine was seized from the hotel room in violation of the Fourth Amendment and that Petitioner received ineffective assistance of counsel [Docket No. 116]. The petition was denied for several reasons, including a finding that at least some of the cocaine was in plain view at the time of the search [Docket No. 139].[2] The court also found that that Petitioner was not prejudiced by his counsel's actions. The Court of Appeals affirmed the dismissal of the first § 2255 petition in Larson v. United States. 833 F.2d 758, 759 (8th Cir. 1987).

[1] For a complete explanation of the facts relating to Petitioner's offense and affirming his conviction see United States v. Larson, 760 F.2d 852 (8th Cir.1985), cert. denied. 474 U.S. 849 (1985).

2 The trial testimony indicated that the tops of at least some of the grocery bags where cocaine was found were open when the hotel manager looked inside and saw plastic bags filled with white powder. See Mem. Op. and Order of July 2, 1987 [Docket No. 139]. In addition, the court determined that Petitioner had been given a "full and fair opportunity" to raise Fourth Amendment arguments at his pretrial suppression motion, at trial, in a motion for a new trial, on appeal, and in his petition for writ of certiorari. Id.

In 1988 Petitioner filed a second § 2255 petition challenging the district court's finding that some of the cocaine was in plain view and repeating his ineffective assistance of counsel argument [Docket No. 146]. Petitioner presented what he characterized as new evidence, his own affidavit and an affidavit from a private investigator that had interviewed several witnesses. According to Petitioner, this evidence demonstrated that the cocaine was not in plain view. The court rejected Petitioner's arguments, however, and the second petition was denied on its merits [Docket No. 167]. The court found the claims would have failed even if all of the facts alleged by Petitioner were accepted as true. The Court of Appeals affirmed the dismissal in Larson v. United States. 905 F.2d 218, 220 (8th Cir. 1990).

Petitioner's third § 2255 petition, filed in 1991, again claimed that the seizure of the cocaine violated the Fourth Amendment and that he had received ineffective assistance of counsel [Docket No. 175]. This petition also raised a discovery claim that was denied as abusive. The ineffective assistance and Fourth Amendment claims were dismissed as successive [Docket No. 206] and the Court of Appeals affirmed in Larson v. United States. No. 92-2212MN (8th Cir. 1992).

Petitioner's fourth § 2255 petition raised arguments similar to those found in the previous three petitions. According to Petitioner, a determination on the merits of his case had not taken place since the files and records did not resolve whether or not the cocaine was in plain view at the time the hotel room was searched. Petitioner produced affidavits from officers who had conducted the search of the hotel room. Petitioner asserted that the affidavits proved the cocaine was not in plain view at the time of the search. Judge Diana E. Murphy, then District Court (P.3) Chief Judge, found that "the new affidavits do not provide any information that has not already been considered" and, even if the evidence were new, it would not be grounds for habeas relief. Mem. Op. and Order of July 22,1994 [Docket No.

217]. The petition, including the ineffective assistance claim, was denied as successive and the Court of Appeals affirmed [Docket No. 223]. In August, 1991, Petitioner completed his sentence. He brought this Motion in December, 2002, to have his conviction and sentence vacated through a writ or error coram nobis, again alleging ineffective assistance of counsel and Fourth Amendment violations [Docket No. 225].

III. DISCUSSION

Federal District Courts have power pursuant to 28 U.S.C. § 1651 (a), the all-writs section of the Judicial Code, to vacate convictions and sentences in federal criminal cases through the issuance of a writ of error coram nobis. United States v. Morgan. 346 U.S. 502, 511 (1954). Such a writ is available in very limited situations; there must be a final judgment in the case and an "exhaustion or waiver" of all other statutory remedies. Id. Even if no other alternative exists, a writ of error coram nobis is an "extraordinary remedy" that is allowed "only under circumstances compelling such action to achieve justice." Id. (explaining that a federal trial without a competent and intelligent waiver of counsel may be an example of when conviction is inappropriate). To grant coram nobis relief an error must have occurred that is "of the most fundamental character." Id. at 512. See also Kandiel v. United States. 964 F.2d 794, 796-97 (8th Cir. 1992) (finding that Kandiel did not articulate fundamental errors or compelling circumstances to justify coram nobis relief). In this case. Petitioner fails to meet the heavy burden required to apply coram nobis relief.

(P.4)

Petitioner primarily asserts that cocaine taken from the hotel room was done so in violation of the Fourth Amendment since it was seized from closed containers without a warrant. Pet'r Mot. at 10-14. According to Petitioner, the July 2,1987 Order is factually flawed in its holding that some of the cocaine was in plain view. Id. at 12.

Petitioner claims that the finding focused only on what the hotel manager saw, which was white powder that turned out not to be cocaine, rather than determining whether or not the police viewed the cocaine in plain sight. Id. at 13. Petitioner also argues that affidavits from police officers involved in the search are new evidence that should be considered by this Court. The affidavits, Petitioner asserts, prove that all of the cocaine was found in closed containers. Id. at 11. Finally, Petitioner argues that his attorneys were ineffective for failing to raise the closed container argument at trial and for failing to interview the officers. Id. at 18-19.

Petitioner's Fourth Amendment argument does not warrant coram nobis relief. Petitioner's assertion, that all of the cocaine was in closed containers, has been considered and rejected numerous times, with various courts finding that at least some of the cocaine was in plain view. It was also determined by Petitioner's second and fourth § 2255 petitions that the police affidavits and the affidavits from Larson and the private investigator failed to provide any information that the court has not already considered. See Larson, 960 F.2d at 219-20; Mem. Op. and Order of July 22, 1994 [Docket No. 217]. Regardless, the affidavits from the police officers do not affirmatively prove that all of the cocaine was hidden from view. Officer dark Holden's affidavit is illustrative:

a. Exhibit No. 1 was packaged as follows: The cocaine was inside three ziplock plastic bags. This in turn, was inside the brown paper grocery bag. Duane Larson contends that the ziplock bags were inside a manila envelope. I cannot recall whether Exhibit 1 included a manila envelope similar to Exhibits 2 and 3.

(P.5)

Aff. Clark Holden ¶ 13a (App. 4).[3] Finally, even if the cocaine was hidden from view Petitioner no longer had an expectation of privacy in the hotel room where the search

[3] There is usually no expectation of privacy in unsealed paper bags. See, e.g., United States v. Mefford, 658 F.2d 588, 591-92 (8th Cir. 1981).

took place and the search was also justified under the exigent circumstances exception. Larson 760 F.2d at 854-56. Thus, no fundamental error exists that would require this Court to issue a writ of coram nobis based on Fourth **Amendment grounds.**

Petitioner's ineffective assistance of counsel argument also fails to justify coram nobis relief. To prove ineffective assistance of counsel Petitioner must show that his counsel's performance fell below "an objective standard of reasonableness" and that he was prejudiced by the error. Strickland v.Washington. 466 U.S. 668, 687-88 (1984). Here, Petitioner had three attorneys working on his defense, including Raymond Smith who was successful in suppressing some of the cocaine and whose efforts resulted in dismissal of one count of the indictment. See Mem. Op. and Order of July 2, 1987 [Docket No. 139]. The prior determination that some of the cocaine was in plain view and that Petitioner's Fourth Amendment claim is without merit precludes the ineffective assistance of counsel argument. See United States v. Johnson, 707 F.2d 317, 323 (8th Cir.1983). Petitioner has not shown that his conviction and sentence must be vacated to achieve justice. See United Sates v. Camach-Bordes, 94 F.3d 1168, 1173 (8th Cir. 1996). Accordingly, Petitioner's Motion is denied.

(P.6)

IV. CONCLUSION

Based on the foregoing, and all the files, records, and proceedings herein, **IT IS HEREBY ORDERED** that Petitioner's Motion of Application for a Writ of Error Coram Nobis in accordance with 28 U.S.C. § 1651 [Docket No. 225] is **DENIED,**

BY THE COURT:

"S/_____."
Ann D. Montgomery
U.S. District Judge

Date: February 26, 2003

(P.7).

United States of America, Appellee, v. Duane Wendall Larson, Appellant; United States of America, Appellee, v. Sheila Jane Burgess, Appellant

Nos. 84-5080, 84-5081

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

760 F.2d 852; 1985 U.S. App. LEXIS 30964

December 10, 1984, Submitted
April 11, 1985, Decided

SUBSEQUENT HISTORY: [**1]

Petition For Rehearing En Banc Denied May 31, 1985.

PRIOR HISTORY: Appeals from the United States District Court for the District of Minnesota, Diana Murphy, District Court Judge.

LexisNexis (TM) HEADNOTES - Core Concepts:

COUNSEL:

Michael Nash, Chicago, Illinois, Raymond J. Smith, Chicago, Illinois, for Appellant.

Richard E. Vosepka, Minneapolis, Minnesota, for Appellee.

JUDGES:

Heaney, Ross, and Fagg, Circuit Judges.

OPINION BY:

ROSS

OPINION:

[*853] ROSS, Circuit Judge

A jury found Duane Wendell Larson and Sheila Jane Burgess guilty on a count of an indictment which charged them with possessing three pounds of cocaine with intent to distribute in violation of *21 U.S.C. § 841*(a)(1) (1982), and aiding and abetting such action in violation of *18 U.S.C. § 2* (1982). The cocaine was discovered by police upon a warrantless search of a motel room in Burnsville, Minnesota.

On appeal, both defendants argue that the evidence obtained pursuant to the search should have been suppressed. The defendants also assert that the trial court violated their due process rights by refusing to grant a continuance and by failing to conduct a sufficient review of the magistrate's findings and recommendations on their motions to suppress. Finally, defendant [**2] Burgess argues that the evidence was insufficient to support her conviction, that the prosecutor failed to disclose certain evidence in violation of the dictates of *Brady v. Maryland, 373 U.S. 83, 10 L. Ed. 2d 215, 83 S. Ct. 1194 (1963),* and that her due process rights were violated in that she was not given sufficient time to prepare for trial.

We affirm defendant Larson's conviction, but reverse defendant Burgess' conviction based on the insufficiency of the evidence to support her conviction. Due to our resolution [*854] of Burgess' sufficiency of the evidence issue, we shall not address the other issues as they relate to her.

FACTS

On the afternoon of October 28, 1983, a woman rented room 124 of a Howard Johnson's motel for one night. The woman registered under defendant Burgess' name and

address and advised the desk clerk that two people would be occupying the room. She paid for the room in advance, as required by motel policy.

On the morning of October 29, 1983, the woman checked out of the motel and took a taxi to the airport to pick up a car. She had received permission from William Webster, the assistant manager, for the other occupant of room 124 to [**3] stay in the room until 2:00 p.m. The normal checkout time is noon.

At about 2:30 p.m. a maid went to clean the room, but was told by defendant Larson that "he did not want service and was staying over." The maid then informed Webster of this occurrence.

Webster sent a bellman to the room at about 5:30 p.m., since he feared that the occupant of room 124 would leave without paying for several long distance phone calls which had been made from the room. The bellman reported that the room was unoccupied.

Webster then went to examine the room himself. When no one answered the door, he entered and discovered empty liquor bottles, prescription pills, keys, and grocery bags containing plastic bags with white powder in them. After getting the motel's assistant restaurant manager to help him examine the white powder more closely, he called the motel's general manager and the police.

At about 6:40 p.m. two Burnsville police officers arrived at the motel. Webster informed them that there were several bags containing a suspicious white powder in a vacated room.

At about 7:00 p.m. Webster knocked on the door to room 124. He was about to enter, using a passkey, when he heard an answer from [**4] within the room. Webster informed the occupant that the day's rent had not been paid. Larson replied from within that "he'd be down to take care of it in a few minutes." Webster replied "okay."

The police then knocked on the door and asked to talk to Larson. After a short delay, Larson came out of the room and closed the door behind him. When Larson refused to let the officers enter the room, the officers sought consent from the motel manager. Upon receiving the manager's consent, the police entered room 124 and discovered the cocaine.

DISCUSSION

A. Motel Search

Larson moved to suppress the cocaine seized in room 124 on the ground that the search violated his fourth amendment rights. The government contends, and the district court found, that Larson failed to meet his burden of proving that he had a legitimate expectation of privacy in room 124 at the time of the search. *See Rawlings v. Kentucky, 448 U.S. 98, 104-05, 65 L. Ed. 2d 633, 100 S. Ct. 2556 (1980); Rakas v. Illinois, 439 U.S. 128, 131 n.1, 58 L. Ed. 2d 387, 99 S. Ct. 421 (1978).*

The district court relied primarily on the decision in *United States v. Parizo, 514 F.2d 52 (2d Cir. 1975).* In [**5] *Parizo*, the court held that the admission of a sawed-off shotgun seized by a police officer from the defendant's motel room was proper since the defendant, Chester Parizo, lacked a reasonable expectation of privacy in the motel room.

The facts in *Parizo* are similar to those in this case. First, like Larson, Parizo had stayed in his motel room beyond the occupancy period without paying for the next day's rent. Second, both Larson and Parizo had informed motel employees of their intent to stay in their motel rooms for an extended period. Finally, both Larson and Parizo had their rooms searched, and their contraband seized, by police officers after motel employees had discovered their contraband.

[*855] The court in *Parizo* applied the facts as follows:

> The facts of the present case illustrate the close relationships of these conceptual bases: when the term of a guest's occupancy of a room expires, the guest loses his exclusive right to privacy in the room. The manager of a motel then has the right to enter the room and may consent to search of the room and the seizure of the items there found. *United States v. Croft, 429 F.2d 884 (10 Cir. 1970)* provides [**6] the clearest example of this point. The defendant had rented a motel room for two days. Shortly after the checkout time on the second day law enforcement officials, with the permission of the motel manager, searched the room and subsequently removed incriminating evidence. The court stated that the constitutional protection "is dependent on the right to private occupancy of the room. *When the rental period has elapsed, the guest has completely lost his right to use the room and any privacy associated with it.*" *Id. at 887.* See, also, *Abel v. United States, 362 U.S. 217, 241, 80 S. Ct. 683, 4 L. Ed. 2d 668 (1960); United States v. Cowan, 396 F.2d 83 (2 Cir. 1968).*

Id. at 54 (emphasis added, footnote omitted). *See also United States v. Lee, 700 F.2d 424, 425* (10th Cir.), *cert. denied, 462 U.S. 1122, 103 S. Ct. 3094, 77 L. Ed. 2d 1353 (1983); United States v. Haddad, 558 F.2d 968, 975 (9th Cir. 1977).*

We agree with the reasoning in *Parizo*. Here, Larson's exclusive right to privacy in room 124 elapsed prior to the police search. Larson stayed in the room seven hours beyond the checkout time and five hours beyond the time he had been given permission [**7] to stay without paying for the next day's rent in advance as required by motel policy. In addition, Larson had never checked into the room. Burgess had checked in but had also checked out several hours before

the search. The district court's finding that Larson's communications with motel personnel were not sufficient to support a reasonable expectation of a right of privacy in the room under these circumstances is supported by the facts. Accordingly, we affirm the district court's finding that Larson lacked a legitimate expectation of privacy in room 124 at the time of the search.

In addition, even if Larson had established a legitimate expectation of privacy in the room, the warrantless search was justified under the exigent circumstances exception. n1 First, the officers had probable cause, under the totality of the circumstances, to believe that contraband was located in room 124. *See Illinois v. Gates, 462 U.S. 213, 103 S. Ct. 2317, 2328, 76 L. Ed. 2d 527 (1983).* Both the assistant manager and the assistant restaurant manager had closely examined the white powder in the plastic bags. In fact, they had even rubbed it between their fingers in an effort to determine what it [**8] was. Both concluded that the powder was an illegal substance. The police officers were fully informed of this conclusion, as well as other circumstances surrounding room 124, by the assistant manager upon their arrival at the motel.

> n1 The magistrate found that exigent circumstances justified the warrantless search. The district court, however, made no findings on the issue. Instead, the court denied Larson's motion to suppress the cocaine solely on the basis that Larson lacked a legitimate privacy interest in room 124 at the time of the search.

Second, exigent circumstances existed making it necessary to search the room before a warrant could be obtained. Room 124 was on the ground floor and had two entrances. At the time the officers entered the room, they had no knowledge as to whether there were other occupants of

room 124, as it had previously been thought that the room was vacant. Unless the officers acted quickly, there was a danger that the cocaine would be destroyed or removed from the room either [**9] by another occupant, or by Larson when the police were done questioning him. We have previously held that such an exigency removes the requirement that the police officers act [*856] with a warrant. *See, e.g., United States v. Knobeloch, 746 F.2d 1366, 1367 (8th Cir. 1984), cert. denied, 470 U.S. 1006, 105 S. Ct. 1362, 84 L. Ed. 2d 383 (1985); United States v. Palumbo, 735 F.2d 1095, 1097* (8th Cir.), *cert. denied, 469 U.S. 934, 105 S. Ct. 332, 83 L. Ed. 2d 268 (1984); United States v. Kulcsar, 586 F.2d 1283, 1286-88 (8th Cir. 1978).* Accordingly, we find that the district court's denial of the motion to suppress the cocaine was proper.

B. Continuance

Larson next alleges that his due process rights were violated by the trial court's failure to grant his motion for a continuance. On January 30, 1984, two days prior to trial, Larson's attorney filed a motion for a continuance. The sole reason given for the requested delay was that the attorney who was to present his case at trial, Oscar Goodman, was engaged in a trial in Nevada which would last approximately one week. Larson attached an affidavit explaining that each of his three sets of attorneys had [**10] been hired to perform specific tasks -- one to conduct the trial, one to draft and litigate pretrial motions, and one to serve as local counsel.

The district court denied the motion on the basis that Larson had been given adequate time for trial preparation and adequate notice of the trial date. n2 The court also noted that the court had a full docket, that the court had not been informed of the division of functions amongst Larson's attorneys prior to Larson's motion for a continuance, and that Larson took a risk that his Nevada trial attorney would be engaged in a trial in that state.

n2 Larson had been indicted on October 29, 1983, and arraigned on November 23, 1983. At the time of arraignment, trial was set for January 25, 1984. On January 19, 1984, the trial was rescheduled to January 30, 1984, so that objections to the magistrate's findings and recommendations, which were issued on January 19th, could be filed. Subsequently, the trial was postponed until February 1, 1984, to allow counsel to file responses to their respective objections to the magistrate's findings and recommendations.

[**11]

On the morning of February 1, 1984, the court heard arguments on Larson's motion to withdraw appearances of all counsel other than Oscar Goodman and on a renewed motion for a continuance. The court again denied Larson's motion for a continuance. The court stated that, in addition to the previous reasons given for denial of the motion, denial was appropriate since the case was not exceedingly complex. The court also emphasized the uncertainty of when Goodman would ever be available for trial. While Goodman had previously estimated that his trial would last one week, he was now estimating that the trial would last at least two weeks.

The court also denied Larson's motion to withdraw appearance of all counsel other than Oscar Goodman. Larson refused to permit his other attorneys (specifically, Raymond Smith, who handled the pretrial motions) to participate in the trial on the basis that he felt Oscar Goodman could do a better job and because he did not feel that the other attorneys were prepared for the trial. After fully advising Larson of the dangers of proceeding without counsel, the court permitted Larson to proceed without counsel, but asked that the other attorneys serve as [**12] standby counsel.

It is well established that trial courts are vested with broad discretion in matters of continuances. *See Morris v. Slappy, 461 U.S. 1, 103 S. Ct. 1610, 1616, 75 L. Ed. 2d 610 (1983); Ungar v. Sarafite, 376 U.S. 575, 589, 11 L. Ed. 2d 921, 84 S. Ct. 841 (1964); United States v. Lingo, 740 F.2d 667, 668 (8th Cir. 1984).* In *United States v. Bernhardt, 642 F.2d 251 (8th Cir. 1981),* we listed the following five factors which trial courts must weigh when exercising this discretion:

> 1) the nature of the case and whether the parties have been allowed adequate time for trial preparation;
>
> 2) the diligence of the party requesting the continuance;
>
> 3) the conduct of the opposing party and whether a lack of cooperation has contributed to the need for a continuance;
>
> [*857] 4) the effect of the continuance and whether a delay will seriously disadvantage either party;
>
> 5) the asserted need for the continuance, with weight to be given sudden exigencies and unforeseen circumstances.

Id. at 252. The trial court here recognized the existence of these factors, as it cited *Bernhardt* when denying Larson's motion for a continuance. [**13]

Each of the factors as applied to Larson's case indicates that Larson's motion for a continuance was properly denied. First, the case was not complex, and adequate time for trial preparation and adequate notice of the scheduled trial date had been given. Second, the defense team exhibited a lack of diligence in that the court was not informed of Goodman's status as trial attorney, or of his scheduling conflict, until

two days before trial. Third, the government did not contribute in any way to the need for a continuance. Fourth, denial of the continuance did not seriously disadvantage Larson, as he had attorneys available to him who were thoroughly familiar with his defense and competent to handle the trial. Finally, Goodman's scheduling conflict was not altogether unforeseeable. If the court had been put on notice of the problem earlier, it might have been able to accommodate Goodman's schedule. In sum, we find that the trial court did not abuse its discretion, as it had more than ample justification for denying Larson's motion for a continuance.

C. Review of Magistrate's Recommendations

Larson's final claim is that the trial judge failed to make a *de novo* review of [**14] the record of the hearing before the magistrate on the motion to suppress, or of the particular findings and recommendations of the magistrate which he objected to. This claim is primarily founded on the fact that the trial judge's order denying Larson's motion to suppress the cocaine was issued on January 31, 1984 -- only one day after Larson filed his objections to the magistrate's findings and recommendations and only eleven days after the magistrate's findings and recommendations were filed.

The Federal Magistrates Act provides that: "A judge of the court shall make a de novo determination of those portions of the [magistrate's] report or specified findings or recommendations to which objection is made." *28 U.S.C. § 636*(b)(1) (1982). In addition, the Fifth Circuit has held that constitutional concerns require that "an appellate court * * * be satisfied that a district judge has exercised his non-delegable authority by considering the actual testimony, and not merely be reviewing the magistrate's report and recommendations." *United States v. Elsoffer, 644 F.2d 357, 359 (5th Cir. 1981). See Hernandez v. Estelle, 711 F.2d 619, 620 (5th Cir. 1983). See generally United* [**15] *States v.*

Raddatz, 447 U.S. 667, 65 L. Ed. 2d 424, 100 S. Ct. 2406 (1980).

We are satisfied that the trial judge here exercised her authority properly, as her order denying Larson's motion to suppress the cocaine expressly states that she made a *de novo* review of the record and that she conducted a thorough review of all objections and responses to the magistrate's findings and recommendations.

D. Sufficiency of the Evidence (Burgess)

Burgess argues that the evidence was insufficient to support her conviction for possession of cocaine with intent to distribute and for aiding and abetting Larson in such action. To establish Burgess' guilt on the possession with intent to distribute charge, the government was required, of course, to establish Burgess' possession of the cocaine. This court has determined that the requisite possession may be either actual or constructive, and has defined constructive possession as "knowledge of presence plus control." *United States v. Caspers, 736 F.2d 1246, 1249 (8th Cir. 1984).*

To establish Burgess' guilt on the aiding and abetting charge, the government was required to establish that Burgess [*858] associated herself with [**16] the unlawful venture, that she participated in it as something she wished to bring about, and that she sought by her action to make it succeed. *Nye & Nissen v. United States, 336 U.S. 613, 619, 93 L. Ed. 919, 69 S. Ct. 766 (1949); United States v. Anziano, 606 F.2d 242, 244-45 (8th Cir. 1979).* Since Burgess must have engaged in "'some affirmative participation * * * which at least encourages the perpetrator,'" her "mere presence * * * at the scene of the crime or * * * [her] mere association with persons engaged in illegal activity is not sufficient" to establish that she was guilty of aiding and abetting. *United States v. Anziano, supra, at 245* (*quoting United States v. Knife, 592 F.2d 472,*

476 (8th Cir. 1979)). See United States v. Kelton, 446 F.2d 669, 671 (8th Cir. 1971).

When reviewing the sufficiency of the evidence to uphold a guilty verdict, we apply the following principles:

> First, the court must view the evidence in the light most favorable to the verdict rendered. Second, the court must accept all reasonable inferences which tend to support the jury verdict. Third, the evidence need not "exclude every reasonable hypothesis except that of [**17] guilt but simply that it be sufficient to convince the jury beyond a reasonable doubt that the defendant is guilty."

United States v. Wells, 721 F.2d 1160, 1161 (8th Cir. 1983) (quoting United States v. Taylor, 599 F.2d 832, 838 (8th Cir. 1979)) (citations omitted). Applying these principles, we find that the evidence does not sufficiently establish Burgess' guilt.

The evidence against Burgess consists almost exclusively of the fact that she had checked into and stayed with Larson in the motel room from which the cocaine was later seized. But, as Burgess emphasizes, she had checked out of the motel room over seven hours before the evidence establishes that the cocaine was in the motel room. n3

> n3 Burgess checked out at about 10:30 a.m. The assistant manager first discovered the cocaine at about 6:00 p.m. There is no evidence as to the actual time at which the cocaine made its way into the motel room.

In addition to Burgess' presence at the motel room, the government attempts to sue certain [**18] other

circumstantial evidence to infer Burgess' guilt. First, the government points out that Burgess had familial and financial relationships with Larson, in that Larson was married to Burgess' sister and Larson had a financial interest in Burgess' two cars. According to the government, the inference to be drawn from this evidence is that Larson and Burgess are in the drug business together.

Second, the government emphasizes that Burgess had picked up a car at the airport after checking out of the motel. According to the government, the inference to be drawn is that Burgess picked up the cocaine at the airport and then took it to Larson.

> The government's evidence is so scant that the jury could only speculate as to Burgess' guilt. The evidence is such that a reasonably minded jury *must* have a reasonable doubt as to Burgess' knowledge of the existence of the cocaine or of her intent to aid and abet Larson's drug scheme. *See United States v. Frol, 518 F.2d 1134, 1137 (8th Cir. 1975); United States v. Stephenson, 474 F.2d 1353, 1355 (5th Cir. 1973).* Accordingly, the facts of this case require that we vacate the judgment of conviction as to Burgess.

In sum, the judgment [**19] of the district court is affirmed as to Larson and reversed as to Burgess.

U.S. District Court
District of Minnesota
Fourth Division

Duane Wendall Larson
Petitioner,

Vs.

U.S. of America
Respondent.

Memorandum Opinion
And Order

Civ. 4-896-483
Crim. 4-83-84

Petitioner Duane W. Larson **was** convicted of one count alleging possession of approximately three pounds of essentially undiluted cocaine with intent to distribute and aiding and abetting. He was sentenced to ten years imprisonment and a $25,000 fine. His conviction was affirmed, after which he began to serve his sentence. United States v. Larson, 760 F.2d 852 (8th Cir.), cert. denied. 106 S.Ct. 143 (1985).[1]
Larson has petitioned for relief pursuant to 28 U.S.C. § 2255. He seeks to have his conviction vacated or, alternatively, to have his sentence and the presentence investigation corrected. United States Magistrate Floyd E. Boline recommended denial of all requests for relief with the exception of one issue on which he made no recommendation. The matter is now before the court on

1 Larson also pleaded guilty before the Honorable Edward J.Devitt to one count of tax evasion. A five year sentence was imposed, and he is now serving an aggregated sentence of fifteen years.

Filed: July 02, 1987

(P.1).

Larson's objections to the Report and Recommendation and the government's response to them.

Petitioner's § 2255 submission consisted of six separate motions seeking various forms of relief. First, Larson asserted that his conviction was unlawful because it was based on illegally seized evidence. He then asserted that his conviction cannot stand because he was denied effective assistance of counsel by two attorneys. His third request was for a new trial "with counsel of his choice"." Fourth, he sought resentencing on a variety of grounds: Fed.R.Civ.P. 32 (c)(3)(D), 48 U.S.C.§ 4205(b)(2), the reversal of his codefendant's conviction, and possible reliance in sentencing on two prior convictions that should have been expunged from the record. Fifth, he claimed that the court relied on erroneous information about parole guidelines and therefore should reduce his sentence. Finally, he argued that his aiding and abetting conviction should be vacated because his codefendant's conviction was reversed. Magistrate Boline considered each of these arguments, but found none persuasive.

Larson obviously reviewed the Report and Recommendation carefully and submitted objections to the magistrate's findings and recommendations on all or part of the first, second, and fourth of his original claims. He explicitly did not object to the magistrate's rejection of the other three claims. Pursuant to Fed.R.Civ.P. 72(b), the court has made a de novo determination of those matters to which objections were filed. In making

(P.2).

its de novo determination, the court has carefully studied petitioner's objections and his exhibits, as well as the entire record, including the thorough Report and Recommendation and the trial transcript. After this de novo review, the court finds itself in basic agreement with the magistrate on most

issues. The court was obviously aided in review and consideration of the record by having presided at trial and the sentencing hearing.

Request for Evidentiary Hearing

Petitioner seeks an evidentiary hearing and Magistrate Boline found as a preliminary matter that there was no need for such a hearing. Section 2255 requires such a hearing "[u]nless the motion and the files and records of the case show conclusively that the prisoner is entitled to no relief," 28 U.S.C. § 2255. "[T]he decision as to whether a hearing is necessary to determine factual contentions is committed to the discretion of the district court." Widgery v. United States, 796 F.2d 223, 224 (8th Cir. 1986).

The magistrate found the files and records an entirely adequate basis for determining the merits of all but one of Larson's claims. Larson now concedes that most of his claims can be resolved without a hearing. The "possible exception" identified by the magistrate, and emphasized by Larson, relates to his claim that certain advice of attorney Oscar Goodman amounted to ineffective assistance of counsel.

(P.3).

In support of his objections, petitioner has filed his own affidavit, as well as one by his wife. They state Goodman confirmed in a June 1986 telephone call that he had advised petitioner not to participate at trial if the court didn't grant a continuance because a new trial would result, at which Goodman would represent him.[2] Larson seeks an evidentiary hearing to bring this out. Such a hearing is not necessary, however, because for purposes of this petition, the court will take as true Larson's account of the advice given by attorney Goodman. Fourth Amendment Claims.

The three pounds of cocaine at issue in this case were seized in a search of a motel room. This search was

[2] His affidavit also states he spent $250,000 in his defense: $30,000 to Jay Kelley, $50,000 to Goodman, and the remainder to Raymond Smith.

described at trial and on appeal. 760 F.2d at 852. Larson's codefendant rented the room for a single night, paying in advance. She checked out the following morning, after obtaining permission for Larson to stay until 2:00 p.m., two hours past the usual check out time. Larson did not leave by 2; 00 p.m. and subsequently told a maid that he intended to stay an additional night. He did not pay for the second night, however. At about 5:30 p.m., fearing that Larson would leave without paying for certain telephone calls, a hotel manager sent a bellman to check out the room. Informed that no one was present, the manager entered the room, where he found personal effects, empty liquor bottles,

(P.4).

prescription pills, and grocery bags containing plastic bags of white powder. He informed the general manager, who called the police. After police arrived at the motel and knocked on the room door, Larson responded and refused to permit them to enter the room. The motel manager consented to the search, but no warrant was obtained.

In his objections, Larson concentrates his fourth amendment argument on the warrantless search of the grocery bags found in the motel room, which he describes as closed containers.[3] Magistrate Boline, relying on Stone v. Powell, 428 U.S. 465 (1976), concluded that Larson was not entitled to raise fourth amendment claims because he had already had a "full and fair opportunity" to present them at a number of stages in the proceedings: in his pretrial suppression motion before Magistrate J. Earl Cudd and on de novo review to the district court, at trial, in a motion for a new trial, on appeal, and in his petition to the Supreme Court for a writ of certiorari. To the extent that Larson and counsel failed specifically to raise the container issue, the Magistrate

[3] The trial testimony revealed that when the hotel manager looked into the grocery bags, he saw plastic bags inside, filled with white powder. Not all the plastic bags were in manila envelopes, and the tops of some of the grocery bags were open. Pretrial Transcript (P.T.) (Vol.) I: 62-3, 134. Trial Transcript (T.T.) II: 307-8, 312, 336, 351, 373.

found that it had been waived under Fed. R. Civ. P. 12 (b)(3) and (f).

Larson argues that the magistrate overestimates the scope of Stone v. Powell and that he did not waive his container search

(P.5).

argument. He states "[p]ermission to raise the container issue mid-trial would most likely have been denied. (Objections at 16) and at trial "it was already too late to raise the container issue." (Objections at 21). The record contradicts this. The court told petitioner at trial he had the right to challenge the government's evidence and warned he was in danger of giving up that very important right. T.T. I: 220-21; II: 394. He was told the jury would decide his fate based -on the evidence that I allow in and on the instructions that I'm going to give at the end of the case." T.T. I: 221. Larson admitted he understood this.[4] And Smith continued to raise suppression issues at trial. T.T. II: 299; III: 528.

The objections suggest that the focus of Larson's argument is not so much the fourth amendment per se. Rather, he stresses that counsel's failure to raise the container argument is proof of ineffective assistance. His ineffective assistance argument will be considered separately.

The court finds itself in basic agreement with Magistrate Boline's findings and conclusions with respect **to** the full and fair opportunity petitioner had to litigate fourth amendment

(P.6).

4 The Court: "You have the right to object to any evidence that comes in by any form. You have the right to request limiting instructions from the court. You have the right to seek to suppress evidence during the course of the trial .... You understand that . . . don't you?" Larson: "Yes, I do. Your Honor." T.T. III: 442

claims and his waiver of the right to raise them. Larson is not entitled to mount a collateral attack here on the search and seizure of the bags. Nor is he entitled to a new trial or the suppression of the evidence. Even if the court were to reach the merits of the container issue, the record indicates at least some of the cocaine was in plain view rather than in closed and opaque container. See supra note 3.

Ineffective Assistance of Counsel

Several attorneys appeared on Larson's behalf during the pre-trial stages of the case including Jay Kelley of Minneapolis, Minnesota, Raymond Smith of Chicago, Illinois, and Oscar Goodman of Las Vegas, Nevada.

On January 30, 1984, two days before trial, Larson moved for a continuance. Larson explained that he had hired three sets of attorneys - one to conduct the trial, one to handle pre-trial motions, and one to serve as local counsel. Although he had not previously informed the court of this arrangement, he argued that only Goodman could present the case at trial and that he was engaged in another trial which would last approximately one week. The motion for a continuance was denied because Larson had had adequate time for trial preparation and adequate notice of the trial date. Larson renewed his motion on February 1, 1984, the trial date. The motion was again denied. The court cited the previous grounds for denial and noted the case was not particularly complex, it was increasingly unclear when Goodman would

(P.7).

even be available for trial, and Smith was familiar with the facts of the case.

The court also denied a motion to withdraw appearances by Larson's other counsel and required Smith to act as standby counsel. The court advised Larson of the perils of proceeding without counsel. not participating in the

trial, and not permmitting his attorneys to do so.[5] Nevertheless, Larson refused to

[5] Some examples are illustrative.
The Court: "I hope you'll listen to me carefully right now, because I think that the posture that you're proceeding under right now is not in your best interests, and let me explain why. ... So the consequences for you of the trial could be very great."
T.T. I: 59-60.

The Court: "You'd be much better off if you had your lawyer representing you here. ... I advise you that in my judgment it would be a foolish step for you to take."
T.T. I: 63.

The Court: "Think about it very carefully"
Larson: "I'll do that"
The Court: "Under any way you look at it, you'd be better off ..."
T.T. I: 64.

The court told Larson he was foolish not to be represented by the able counsel available at trial and that constitutional rights can be waived or given up. T.T.I: 116; 218-19.

The Court: "I want you again to talk with the lawyers who have appeared in this case, your standby counsel here, and with Mr. Goodman. It's going to be up to you, but if you choose to go forward in this way, you are giving up very important constitutional rights.". Larson: "I understand that. I appreciate your concern. Mr. Smith is concerned as well, and I've got a certain amount of concern myself. I've got this afternoon to talk with him and think about it and make that decision. As of yet, I haven't made a decision." T.T. II:222. The Court: "I must inform you that you are giving up significant constitutional rights of representing yourself or, more importantly, in my judgment, of being represented by capable counsel that's familiar with this case"

T.T.II: 230.

Larson was told he could change his mind at any time. He stated that he "appreciate[d] [the court's] genuine concern" and would let the court know. T.T. II: 231.

(P.8).

permit counsel to participate in the trial and chose essentially to stand mute.

Larson now argues that he is entitled to a new trial because two lawyers denied him adequate assistance of counsel. Larson's argument as to attorney Goodman rests on his advice that a continuance would be granted or a new trial would be ordered on appeal. Larson asserts that he believed the "prominent" Goodman and therefore relied on his incorrect advice. Larson's argument as "to attorney Smith largely rests on his failure to raise the container search issue in the trial court.

Magistrate Boline refrained from making a finding relating to Goodman's alleged advice or whether it was outside the "range of professionally competent assistance." Strickland v. Washington, 466 U.S. 668, 690 (1984). It is unnecessary to reach the issue of professional competence if petitioner has not demonstrated prejudice, however. Strickland v. Washington, 466 U.S. at 695-96;

(P.9).

United States v. Reed, 756 F.2d 654, 656 (8th Cir.), cert. denied, 106 S. Ct. 111 (1985). For purposes of this motion, the court assumes Goodman gave the advice petitioner claims, but finds that the record shows that petitioner was not prejudiced by such advice.

It was clear at trial that petitioner was making his own decisions after considering the court's instructions and conferring by phone with Goodman and in person with Smith, his standby trial counsel. See, e.g. T.T. I: 63, 222; II: 229, 231. This court gave repeated and detailed instructions to him personally at various steps of the trial. T.T. I: 58-64, 116, 216-22; II: 230-31; III: 442, 548. The court advised him he had no constitutional right to a particular attorney and that he would lose specific rights and opportunities by persisting in his policy of not participating in the trial. Petitioner weighed the various advice he received and made his voluntary decision to proceed in the

way he did. He chose not to heed the court's specific warnings. Clearly he is dissatisfied with the outcome, but he has not shown that it was caused by ineffective assistance of counsel.

As the magistrate said, the evidence against petitioner was overwhelming. He was "caught 'red-handed' with about three pounds of pure cocaine." Report and Recommendation at 19. Other indicia of the drug trade were also found in his room, such as scales, a cutting agent, and packaging equipment. Petitioner stated at trial that Smith was his suppression expert, so

(P.10).

Goodman's absence was not considered critical by him for search and seizure issues. It was petitioner who ordered Smith not to represent him at trial even though Smith was there and in fact continued to act to suppress evidence. T.T. II: 299, 528. The court also told petitioner that he could object to the introduction of any evidence. T.T. I: 220-21; II: 394; III: 442. He stated that he understood that. T.T. III: 442. In short, any advice from Goodman, even if ineffective, or his failure to appear at trial, was not prejudicial under all the circumstances.

Petitioner also claims that Smith's failure to raise the issue of the warrantless search of the containers in the motel room amounted to ineffective assistance of counsel. In his affidavit, he states that he informed the defense team that the cocaine seized "was enclosed in paper bags and also in manila envelopes or smaller paper bags inside the larger bag" and that the defense team had access to photographs of the evidence in the motel room.

The testimony at trial was that not all the cocaine was contained in opaque packaging and that at least some of the cocaine was visible to the hotel manager when he looked around the room. See supra note 3. As already referenced, petitioner chose not to participate with his attorney at trial in the attempt to suppress the evidence. Smith showed himself to be an able attorney in this case, and defense counsel in

fact succeeded in suppressing additional amounts of cocaine and in getting a

(P.11).

second count dismissed. His performance certainly was within the range of reasonable professional conduct. Petitioner has mis-characterized what happened at trial in his attempt to show ineffective assistance, but the record refutes his claim.

Motion for Resentencing

Petitioner advances several bases for his request for resentencing: (1) asserted failure to comply with Fed. R. Civ. P. 32(c)(3)(D) and possible reliance on two prior convictions that should have been expunged from his record; (2) the asserted applicability of 48 U.S.C.§ 4205(b)(2): and (3) the reversal of his co-defendant's conviction. In his Objections, Larson indicates no objection to the magistrate's findings that the second and third of these arguments must fail.

Under Rule 32 (c) (3)(D), where the defendant or counsel allege[s] any factual inaccuracy in the presentence investigation report ... the court shall, as to each matter controverted, make (i) a finding as to the allegation, or (ii) a determination that no such finding is necessary because the matter controverted will not be taken into account in sentencing.

Petitioner now concedes that the court did order expungement of a prior conviction for possession of methamphetamines, but he argues that the reference to a conviction for driving under the influence and open bottle should also have been expunged due to an uncounsled guilty plea. He also alleges error in failing to make specific findings about allegedly incorrect financial information and in failing to exclude portions of the presentence report (PSI) allegedly based on grand jury materials.

(P.12).

Prior to sentencing on May 2, 1984,[6] petitioner submitted two sets of written objections to the PSI. One was written by attorney Kelley and also signed by petitioner; the other was written by Larson himself. These documents complained about certain financial information being grand jury material and about other references to two prior convictions, automobile and house searches, informant statements, and details relating to the motel where the evidence was found. As the magistrate noted, petitioner essentially "objected to the nature of the information" rather than to any potential factual inaccuracies. Report and Recommendation at 25-26..

At the sentencing hearing, petitioner and attorney Smith said they had no further objections. Sentencing Transcript (S.T.) 3-4. Defense counsel recognized that the court had ruled on the objections. S.T. 3. The court noted all the objections and ordered that the PSI be altered to reflect that the conviction for possession of methamphetamines had been expunged. S.T. 31. Other objections were overruled because the type of information challenged had been "generally accepted as appropriate for a presentence report." Id. The court stated to petitioner that

(P.13).

"the evidence associated with this trial shows that you have been a major drug dealer." S.T. 31 (emphasis added).[7]

As indicated at sentencing, the sentence was based on the evidence introduced at trial. The court did not take into consideration in sentencing the challenged financial data, any prior conviction, statements from informants, or results

[6] Petitioner was permitted to remain free on bond pending determination of his appeal so he did not begin to serve his sentence until October 2, 1985.

[7] Petitioner apparently believes that the court's characterization of him as a "major drug dealer" was based on financial data in the PSI. In fact, it was based on the substantial quantity of nearly pure cocaine seized from the motel room, as well as the other indicia of drug distribution found there.

of automobile or house searches. In regard to the events at the motel, the court relied on the trial evidence.

Under Fed. R. Crim. P. 32(c)(3)(D), the court should have made clearer findings and determinations at the sentencing hearing and appended them to the PSI, together with copies of petitioner's objections. Written determinations, together with the objections, will be attached to the PSI and forwarded to the appropriate places. To this extent, petitioner is entitled to relief. He is not entitled to be resentenced, however. United States v. Weber, 818 F.2d 14 (8th Cir. 1987). The record as a whole makes clear that no disputed matter affecting the sentence "remained unaired or unresolved at the hearing." Id. at 15.

Petitioner continues to object to financial data found in the PSI on the grounds that it represents unwarranted use of 'grand jury materials. He relies on United States v. Hogan, 489 F.Supp. 1035 (W.D. Wash. 1980), which held that probation

(P.14).

officers were not entitled to automatic disclosure of grand jury testimony under Fed. R. Crim. P. 6(e)(3)(A)(ii). The instant case is not like Hogan. The Hogan PSI contained material clearly obtained from grand jury records. Here the source of the material was the United States Attorney's office and the Internal Revenue Service. "There is no question that the probation officer ... is entitled to interview government agents and prepare a report that includes the substance of the interviews and the probation officer's personal conclusions." 489 F.Supp. at 1039. It appears that the probation officer in this case did just that. As indicated at the time of sentencing, this objection should be overruled.

Conclusion

After carefully reviewing the record and petitioner's requests for relief, the court concludes that he is not entitled to the relief he seeks and that his motions should be denied and his petition dismissed. Copies of his objections at sentencing and the court's findings and

determinations should be attached to his PSI, however, and this will be addressed in a separate order to be issued today.

Accordingly, based upon the above and all the files, records, and proceedings herein, IT IS HEREBY ORDERED that petitioner's motions for relief under 28 U.S.C. § 2255 are denied, and his petition is dismissed.

Dated: July 2, 1987 "s/ _____"

Diana E. Murphy
U.S. District Judge
(P.15).

U.S. District Court
District of Minnesota
Fourth Division

Duane Wendall Larson, 01786-041-I Petitioner, v. U.S. of America Respondent.	Civil No. 4-88-750 Cr. 4-83-84(1) Report and Recommendation

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FRANCIS L. GOODWIN, Esq., appeared on behalf of the petitioner,
RICHARD E. VOSEPKA, Esq., Assistant United States Attorney, appeared on behalf of the respondent.

BERNARD P. BECKER, United States Magistrate

This matter is before the undersigned United States Magistrate on petitioner's application for a writ of habeas corpus pursuant to 28 U.S.C. §2255 and on his motion for an evidentiary hearing. This case has been referred to the undersigned for Report and Recommendation pursuant to 28 U.S.C. § 636 and Local Rule16.

I. PROCEDURAL HISTORY

Petitioner, Duane Wendall Larson was convicted and sentenced on a count of an indictment charging him with possessing cocaine with intent to distribute and aiding and abetting in violation of 21 U.S.C. §841(a)(l) and 18 U.S.C.

§2. The conviction was appealed. United States v. Larson, 760 F.2d (Filed Jan. 17, 1989)

(P.1).

852 (8th Cir.), cert. denied, 474 U.S. 849 (1985). In 1986, petitioner filed his first 28 U.S.C. §2255 application. He alleged six separate grounds for relief, three of which he argued on appeal to the Eighth Circuit. See Larson v. United States, 833 F.2d 758 (8th Cir. 1987). One of the three issues he argued on appeal was that

> [H]e received ineffective assistance of counsel from one attorney who failed to object to the admission of evidence obtained in the search of the bags and from another attorney who advised him not to participate at trial.

Id. at 758-759.

In his first section 2255 motion before the Honorable Diana E. Murphy, United States District Court for the District of Minnesota, petitioner alleged that he received ineffective assistance of counsel because his attorney, Mr. Smith, failed to raise a suppression motion relative to the alleged illegal seizure of cocaine inside of closed containers. In arguing the substance of his Fourth Amendment claim, petitioner stated in his first petition that "it became abundantly apparent [during the trial] that the cocaine was sealed in packages and concealed from view." Magistrate Boline Report and Recommendation at 13. In his affidavit, petitioner stated that he had informed his defense attorneys that the cocaine was "enclosed in paper bags and also in manila envelopes or small paper bags inside the larger bag." See Judge Murphy Order dated July 2, 1987, at 11. But the district court found that "not all the cocaine was

(P.2).

contained in opaque packaging and that at least some of the cocaine was visible to the hotel manager when he looked around the room" Id. Relative to the Sixth Amendment claim, the Magistrate recommended, and the Court

concluded, that it was significant that the "petitioner chose not to participate with his attorney at trial in the attempt to suppress the evidence" Id. The Magistrate noted that:

> Larson instructed Smith, who **was** instructed by the Court to act as "stand-by" counsel, not to take any part in the proceedings. Larson cannot now complain that he was denied effective assistance of counsel because Smith followed his instructions.

Magistrate Boline Report and Recommendation at 22. Finally, the Magistrate reported that the container search issue "cannot alone be regarded as a professionally unreasonable error" because

> [i]t is clear from the circumstances of the search, and from Larson's own statement of facts in his 2255 motion, that he was more intimately familiar with the location and packaging of the cocaine and the other evidence than the other witnesses. ... If Attorney Smith was unaware until midway through the trial that the cocaine was concealed inside sealed envelopes, his ignorance can only be attributed to Larson's failure to inform him of that fact. (cites) Larson has not alleged that he even informed Attorney Smith of these facts, which would be crucial to the viability of a suppression motion based on an illegal container search.

Id. At 21.

(P.3).

The petitioner's application for section 2255 relief was denied by the district court and affimed on appeal. Larson. 833 F.2d 849. Petitioner now files a second application for section 2255 relief, alleging a violation of his Sixth Amendment right to effective assistance of counsel because his attorney failed to file a motion "to suppress cocaine found in closed containers. Petitioner also moves the Court

to hold an evidentiary hearing on this issue. Specifically, petitioner alleges that the hotel manager did not see any cocaine when he first inspected the room and that he saw only sugar-based substances. Petitioner argues that this information proves that the cocaine seized from the search of his motel room was all in closed containers.

II. DISCUSSION

A. Petitioner's Motion to Re-Litigate Issues Decided in a Prior Section 2255 Application

The issue presented to this Court, i.e., that petitioner has been denied effective assistance of counsel for failure of his attorney to raise the closed container suppression issue, has already been litigated and decided by a court.[1] Furthermore, the issue has been reviewed by the Eighth Circuit Court of Appeals.[2] This Court is not required to

(P.4).

entertain a successive motion under section 2255. Rule 9(b) of the rules governing section 2255 proceedings in the United States District Courts states:

A second or successive notion may be dismissed if the judge finds that it fails to allege new or different grounds for relief and the prior determination was on the merits or, if new and different grounds are alleged, the judge finds that the failure of the movant to assert those grounds in a prior motion constituted an abuse of the procedure governed by these rules.

The statute itself, 28 U.S.C. §2255, provides, in part: "The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner."

[1] Judge Diane E. Murphy, United States District Court for the District of Minnesota. See order dated July 2, 1987 (Docket entry 139).

[2] Larson v.United States, 833 F.2d 758 (8th Cir.1987).

In Sanders v. United States, 373 U.S. 1 (1962), the Supreme Court set forth the conditions which must exist when a court may give "controlling weight" to a denial of a prior application for section 2255 relief. A court may give controlling weight to a previous denial and not hold a hearing or decide the successive petition on the merits

> [0]nly if 1) the same ground presented in the subsequent application **was** determined adversely to the applicant on the prior application, 2) the prior determination was on the merits, and 3) the ends of justice would not be served by reaching the merits of the subsequent application.

Id. at 15. All three of the enumerated factors must be present before a successive petition may be dismissed without a hearing

(P.5).

a review of the claim on the merits. Williams v. Lockhart, 1988 U.S. App. LEXIS 15351 (Nov. 17, 1988).

Regarding the first condition, petitioner herein has asserted the same ground presented in the previous application, which was determined adversely to him at that time. According to the Sanders court, an identical ground may be proven by different factual allegations. Here, the petitioner alleges additional evidence relative to what the hotel manager saw. These facts were not alleged in the previous application for relief, but it is clear petitioner is alleging the same "ground" for relief, i.e. the Sixth Amendment claim.

The second condition imposed by Sanders requires that the prior determination was made on the merits. The Sanders court explained "on the merits" as meaning "that if factual issues were raised in the prior application ... an evidentiary hearing was held." Id. at 16. Here, no evidentiary hearing was held on the initial application for relief, even though petitioner alleged a factual issue, i.e. that all the cocaine admitted against him at trial was found in

closed containers. The district court found that the trial record revealed that some of the cocaine was in plain view of the hotel manager and that not all of the cocaine was in opaque packaging. Under the procedural history of this case, this condition of Sanders cannot be met.

Third, the petitioner must show that the ends of justice would be served by permitting a redetermination of the

(P.6).

issue. In Williams v. Lockhart, 1988 U.S. App. LEXIS 15351 (November 17, 1988). the Eighth Circuit suggested that a petitioner should present new facts or legal developments in order to warrant re-litigation of the claim under Sanders. Id. at 8.

In 1986, the Supreme Court re-examined the standards governing successive habeas petitions. Kuhlmann v. Wilson, 477 U.S. 436 (1986) plurality opinion). A plurality of the justices determined that under the "ends of justice standard," "courts may consider whether there is a colorable claim of factual innocence when presented with a successive petition containing claims previously rejected on the merits." Williams, LEXIS at 8. In Williams, the Eighth Circuit found it unnecessary to each the issue of whether Walker was able to make a colorable showing of factual innocence because he presented no new facts or legal developments which warranted re-litigation of the claim under Sanders. In adopting the standard proposed by Judge Friendly a decade before, the Kuhlman court said,

> "A requirement that the prisoner come forward with a colorable showing of innocence identifies those habeas petitioners who are justified in again seeking relief from their incarceration. We adopt this standard now to effectuate the clear intent of Congress that successive federal habeas review should be granted only in rare cases, but that it should be available when the ends of justice so require. The prisoner may make the requisite

> showing by establishing that under the probative evidence he has a colorable claim of factual innocence. The prisoner must make his evidentiary showing even though—as argued in this case the evidence of guilt may have been unlawfully admitted.
>
> (P.7).

477 U.S. at 454. In a footnote, the court explained that a prisoner does not make a colorable showing of innocence,

> [b]y showing that he might not, or even would not, have been convicted in the absence of evidence claimed to have been unconstitutionally obtained. (cites) Rather, the prisoner must 'show a fair probability that, in light of all the evidence, including that alleged to have been illegally admitted . . . and evidence tenably claimed to have been wrongly excluded or to have become available only after the trial, the trier of the facts would have entertained a reasonable doubt of his guilt.' (cites) Thus, the question whether the prisoner can make the requisite showing must be determined by reference to <u>all</u> probative evidence of guilt or innocence.

Id., footnote 17 (emphasis added).

Mr. Larson has made no colorable showing of factual innocence here. "Almost three pounds of pure cocaine were seized and other evidence of drug trading was present in the searched room occupied by Larson." <u>Larson,</u> 833 F.2d at 759. While the petitioner argues that the cocaine should have been suppressed and thus attempts a showing of <u>legal</u> innocence, there is no basis for the suggestion that the "trier-of-the-facts would have entertained a reasonable doubt of his guilt" in light of <u>all</u> the evidence.

Because all three of the enumerated conditions cannot be met, this Court cannot dismiss petitioners claim

under Sanders. Rather, than give controlling weight to the initial

(P.8).

section 2255 denial, petitioner's case must be reviewed as if before the Court for the first time.

B. Motion for Evidentiary Hearing and Merits of Claim

Petitioner has moved the Court to hold an evidentiary hearing pursuant to 28 U.S.C. §2255. That section provides in part:

> Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States Attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto.

The Eighth Circuit has said,

> [a]n evidentiary hearing on a section 2255 motion must be granted when the facts alleged would justify relief if true, or when a factual dispute arises as to whether or not a constitutional right is being denied.

Smith v. United States, 618 F.2d 507, 510 (8th Cir. 1980); United States v. Kraemer, 810 F.2d 173, 178 (8th Cir. 1987).

Because the statute requires that this Court assess the merits of petitioner's claim in order to decide petitioner's motion for an evidentiary hearing, the merits of his claim will be discussed at this time. Review of the merits is also necessary because, under Sanders, this Court may not give controlling weight to the sentencing court's disposition of petitioner's first section 2255 application.

(P.9).

Here, petitioner claims that he has been denied his Sixth Amendment right to effective assistance of counsel

because his pre-trial attorney, Mr. Smith, failed to move to suppress the search and seizure of certain closed containers containing cocaine. This claim, if true, must have merit in order to justify holding an evidentiary hearing. In order for this claim to have merit, petitioner must meet the standard set forth in Strickland v. Washington, 466 U.S. 668 (1984). In order to prevail, a defendant must show both 1) that counsel's representation fell below an objective standard of reasonableness and 2) that there exists a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. Id. at 688, 694. More recently, the Supreme Court in Kimmelman v. Morrison, 477 U.S. 365 (1986), explained the correct standard to apply when an attorney's incompetence is founded upon a failure to make a Fourth Amendment claim.

> Where defense counsel's failure to litigate a Fourth Amendment claim competently is the principal allegation of ineffectiveness, the defendant must also prove that his Fourth Amendment claim is meritorious and that there is a reasonable probability that the verdict would have been different absent the excludable evidence in order to demonstrate actual prejudice.

Id. At 375.

The Eighth Circuit has adopted substantially the same standard. "The prejudice flowing from an attorney's failure to file a suppression motion is determined by examining the likely

(P.10).

success of the motion." Kellogg v. Scurr, 741 F.2d 1099, 1104 (8th Cir. 1984); United States v. Johnson, 707 F.2d 317, 320 (8th Cir. 1983). In United States v. Johnson, the Eighth Circuit opined that "[t]he failure to make a motion to suppress what is essentially the only evidence against a defendant can be sufficient to establish lack of diligence on the part of the attorney if the motion would have succeeded." 707 F.2d 317, 320 (8th Cir. 1983), citing, United States v.

Easter, 539 F.2d 663 (8th Cir. 1976), cert. denied, 434 U.S. 844 (1977).

Thus, the issue before this Court on petitioner's motion for an evidentiary hearing, is to determine whether a motion to suppress the cocaine, if it had been made, would have been successful. If the suppression motion would have been successful and if petitioner's attorney was so lacking in professional competence as to deny him effective assistance, and, thus, a fair trial, then petitioner's application for relief has merit and an evidentiary hearing should be held.

On review before the Eighth Circuit, the court surveyed the findings and conclusions of the district court in petitioner's first motion under section 2255:

> The district court found some of the seized drugs in the grocery bags were in plain view, and some were obtained during a police search that followed a private search conducted by the owner of the premises. Thus, the search of the bags challenged by Larson was not invalid under the Fourth Amendment.
>
> (P.11).

Larson, 833 F.2d at 759. In this petition, Mr. Larson's second section 2255 application, petitioner asserts facts which might prove two theories: 1) that the police search exceeded the scope of the private search and 2) that the seized drugs were not in plain view of the owner of the premises, i.e. the hotel manager who did the private search, and, by implication, they were not in plain view of the police when they searched the premises. For the purpose of determining the merit of such a suppression motion, this Court will accept as true petitioner's factual allegations relative to what the hotel manager observed.[3]

3 Petitioner also asserts, as he did in his first ection 2255 application, that all the cocaine was in sealed containers and thus should have been

The search of the hotel room could be legitimate under any of several theories: 1) because the rental period of the the hotel room had expired, petitioner lacked an expectation of privacy in the room; 2) the custodian of the premises gave consent to the police to search the room; 3) exigency justified the warrantless entry and search; 4) the cocaine was in plain view when the police came in; or 5) a private search of the room legitimized the later police search. First, the private search

(P.12).

of the motel room. Petitioner's allegations as to what the hotel manager saw in his private search of the hotel room does not differ in a material way with the testimony at trial. At trial, the hotel manager testified that he saw two paper bags on a table. One paper bag had liquor bottles in it, while the other paper bag had two plastic bags of white powder contained within it. T.T. II at 307, 310-312. The new facts alleged by the petitioner clarify that what the hotel manager saw in the room was probably a non-drug substance and not cocaine. But there was no evidence at trial that what the hotel manager saw was indeed cocaine. To the contrary, the hotel manager's description at trial of the two plastic bags filled with white powder in the grocery bag comports with Officer Clark Holden's description at trial of Government Exhibits 6, 7 and 8, which were later identified as sugar-based substances. T.T. III at 527. None of the other grocery bags filled with plastic bags and/or manila envelopes containing cocaine fit the description given by the hotel manager at the trial. The hotel manager saw the only grocery bag -which had two zip lock plastic bags inside. None of the other bags fit this description. Thus, a

suppressed. Petitioner asserts no new facts to convince the Court that the grocery bags were sealed or that the cocaine was in opaque packaging. See United States v. Mefford, 658 F.2d 588, 591-92 (8th Cir. 198), cert. denied, 455 U.S. 1003 (1982). Besides, the files and records in this case conclusively show that the paper bags were not sealed, nor that all of the cocaine was inside opaque containers. A hearing will not be held to delve into the closed container issue.

determination that the private search legitimized the police search would be no different under the facts alleged now by petitioner. Thus, what this discussion proves is that a private search could not support the police search under either the evidence adduced at trial or the "new facts" put forth by petitioner. On the facts, the private search was simply too

(P.13).

limited in scope to legitimize the scope of the police search. See United States v. Jacobson, 466 U.S. 109 (1984).

Second, the plain view doctrine supports the search. At trial, the hotel manager testified that when he first noticed the grocery bags containing the white powder, they were on a table in the hotel room. At that time, no one was in the room. Between the time the hotel manager was in the room and the time the police arrived, the furniture arrangement had been slightly changed. In particular, the table had been moved and the grocery bags were no longer on the table. At the time of the search by the police, there was a grocery bag on the sink in the bathroom (Government Exhibits 1, 2 and 3), one under the TV (Government Exhibit 4), a plastic bag of white powder on, the bed under the bedspread (Government Exhibit 5), a grocery bag with two zip lock plastic bags of powder and a plastic cup inside located on top of the bed (Government Exhibits 6, 7 and 8), and a paper bag containing one plastic bag of white powder under the TV (Government Exhibit 9). There was no evidence at trial that the paper grocery bags (containing the bags and envelopes of white powder) were sealed in any manner. There is no expectation of privacy in a paper bag not sealed with tape, staples or string. United States v. Mefford 658 F.2d 588, 591-592 (8th Cir. 1981), cert. denied, 455 U.S. 1003 (1982). Further, there was no evidence that the manila envelopes, which contained white powder and which were inside the paper grocery bags were sealed. All the plastic bags containing cocaine were

(P.14).

transparent, so that the cocaine could be seen without unsealing the zip lock plastic bag. See Robbing v. California. 453 U.S. 420 (1988) (plurality opinion) (contents of transparent container could be said to be in plain view).

The petitioner provides the Court with no factual allegations that the packages containing the cocaine were sealed and hidden from plain view. The facts before the Court on this issue are the same as those before Judge Murphy on the initial section 2255 motion and at trial. No new evidence has been presented to disprove the view that evidence was in plain view during the search by the police. All that the petitioner alleges is that the hotel manager saw only sugar-based substances and no cocaine. First, this piece of information has absolutely nothing to do with what was in plain view when the police searched the room. Even if the undersigned accepts as true petitioner's allegation as to what the hotel manager saw, it does not alter, under the plain view doctrine, what the police saw. Second, at least one of the grocery bags and the table on which it sat had been moved between the time that the hotel manager saw the room and when the police arrived and searched the room. Thus, what the hotel manager saw is not relevant to what was in the room and in plain view when the police arrived. The inference that the hotel manager and police saw the same items in plain view cannot be supported.

Third, the search of the room can be justified under

the exigent circumstances doctrine.[4] As an initial matter, the police had probable cause to believe that contraband was located in the motel room. See Illinois v. Gates. 462 U.S. 213 (1983). Hotel personnel had examined the white powder in the grocery bag and suspected it was an illegal substance.

[1] This Court is not required to reconsider this issue, since the Eight Circuit reviewed it on direct appeal. 760 F.2d at 855. See Kraemer, 810 F.2d at 177 (petitioner cannot raise the same issues in a section 2255 petition as he did on direct appeal). The following discussion reiterates the findings of the Eighth Circuit.

They contacted the police. Further, the trial transcript revealed that the police, upon arriving at the hotel and after notifying the room's occupant that they had arrived and wanted to speak to him, heard some rustling noises inside the room before the defendant answered the door. Given that the police suspected drug trafficking, the noise of moving around inside the room would lead a reasonable police officer to assume that evidence was being destroyed. Under the totality of the circumstances, robable cause and exigency existed to enter the room without a warrant. See Larson. 760 F.2d at 855.

Fourth, hotel personnel consented to the search of the motel room and petitioner Larson had no expectation of privacy in the room after the rental period expired.[5] Co-defendant Sheila Burgess rented the motel room on October 28, 1983. She paid for the room in advance. The next morning, she checked out

(P.16).

but asked if her co-occupant could remain in the room until two o'clock, two hours after the normal check-out time. After two o'clock, a maid was informed by petitioner that he wished to stay another night. At approximately 5:30 *p.m.*, when no additional rent had been paid for the room and several long distance phone calls still remained unpaid, a bell person was sent to the room to check out the situation. It was reported to the hotel manager that the room was unoccupied. At that point, the hotel manager went to the room and inspected it after finding no one there. He discovered empty liquor bottles in a bag, prescription pills, keys and grocery bags containing plastic bags filled with white powder. 760 F.2d at 855. He called the police. The police arrived at 6:40 p.m. Apparently around 7:00 p.m., the hotel manager went to the room and knocked whereupon a voice answered and the manager and the petitioner had a conversation through the closed door. Then the police knocked on the door and after hearing some noises from

[5] See previous footnote. This issue was litigated on direct appeal.

within, petitioner stepped out of the room, closing the door behind him. Petitioner refused to let the officers enter the room and the hotel manager consented to the entry of the police into the room. Id.

The issue at this point is whether the hotel manager 'had the power to consent to a search of a room occupied by the petitioner. Where the term of a guest's occupancy of a room expires, a guest loses his exclusive right to privacy in the room. At that point, hotel personnel have the right to enter

(P.17).

the room and consent to a search and seizure of items there found. See Larson, 760 F.2d at 855, citing United States v.Parizo, 514 F.2d 52, 54 (2nd Cir. 1975). See also United States v. Croft, 429 F.2d 884 (10th Cir. 1970). "When the rental period has elapsed, the guest has completely lost his right to use the room and any privacy associated with it." Id. ; Croft. 429 F.2d at 887. It is a defendant's burden of proving that he has a legitimate expectation of privacy in a room at the time of the search. See Rawlings v. Kentucky, 448 U.S. 98, 104-105 (1980); Rakas v. Illinois, 439 U.S. 128, 131 n. 1 (1978); Larson, 760 F.2d at 854. Here, petitioner stayed beyond the occupancy period without paying for another day. Although he had informed the maid that he wished to stay another day he had failed to comply with the motel's policy that persons pay for their room in advance. The petitioner simply failed to meet his burden that he had an expectation of privacy in the room. Thus, the hotel was clearly within its rights to consent to a search of the room. Given the lack of privacy by Larson in the room and the consent to search, a search of those items found in the room was therefore permissible.

The search of the motel room can be justified on the basis of several legal theories. Given the fact that the petitioner offers no new evidence that would support a successful suppression motion, it is obvious that petitioner

cannot claim ineffective assistance of counsel on this basis. See Johnson, 707 F.2d at 323.

(P.18).

Further, petitioner offers no factual allegations which undermine the competency of his attorneys at trial. His factual assertions only go to what the hotel manager saw. As discussed, this information does nothing to undermine the validity of the motel room search and the resultant admissibility of the cocaine into evidence. Thus, under Strickland, petitioner cannot meet a prong of the two-part test. In order for his claim of ineffective assistance of counsel to have merit, petitioner must also show under Strickland that his legal representation fell below an objective standard of reasonableness. This Court finds it significant that Mr. Larson had three attorneys working on his case, one of whom worked strictly on suppression-type motions. That attorney, Mr. Smith, worked on petitioner's case for 400 hours. This Court finds it wholly improbable that Mr. Smith fell below an objective standard of reasonableness.

Petitioner's motion for an evidentiary hearing is denied. If petitioner's factual allegations relative to the Hotel manager are taken as true, a review of petitioner's claim of ineffective assistance of counsel has no merit. This Court is not required to hold an evidentiary hearing on a meritless claim. Further, the files and records conclusively show that Mr. Larson is entitled to no relief on this claim. Therefore, his claim should be dismissed on the merits.

Based on the foregoing, and all the files, records and proceedings herein.

(P.19).

IT IS HEREBY RECOMMENDED that petitioner's successive section 2255 application be DISMISSED.

DATED: January 13, 1989.

"s/_____"

Bernard P. Becker

U.S. Magistrate

Pursuant to Local Rule 16C(2), any party may object to this report and recommendation by filing with the Clerk of Court and serving all parties, within ten days, a writing which specifically identifies those portions of this report to which objection is made and the legal and factual basis for that objection. All memoranda and other documents to be submitted in support of this report must be filed within seven days of the making of any objection. Failure to comply with this provision shall operate as a forfeiture of the objecting party's right to seek review in the Court of Appeals.

(P.20).

UNITED STATES DISTRICT COURT DISTRICT OF MINNESOTA FOURTH DIVISION

Duane Wendall Larson, Petitioner

Civil 4-88-750

Vs.

U.S. of America, Respondent.

ORDER

On January 13, 1989, United States Magistrate Bernard P. Becker issued a Report and Recommendation. He recommended that petitioner's successive section 2255 application be dismissed. Subsequently petitioner filed an objection with multiple exhibits. The government has submitted a response to his objections. Petitioner also moved to remand to the magistrate for reconsideration in light of additional evidence.

The court is most familiar with this case, having presided at trial and over petitioner's previous petition. The court has carefully reviewed petitioner's objections and made **a de novo** review of the record as to them. The court has also considered the points made in petitioner's motion. After the court's de novo review and consideration of all the points raised, it finds itself in basic agreement with the findings and conclusions of Magistrate Becker. Further, the court is not persuaded that a remand is warranted.

Accordingly, based upon the above, and all the files, records, and proceedings herein, IT IS HEREBY ORDERED that:

(P.1).

1. Petitioner's successive section 2255 petition is dismissed.
2. Petitioner's motion to remand to remand to the Magistrate for reconsideration is denied.

Dated: February 23, 1989 "s/_____"

Diana E. Murphy U.S. District Judge

U.S. District Court
District of Minnesota
Fourth Division

Duane Larson,
Petitioner,

Civ. No. 4-93-1188
Crim. No. 4-83-84

v.

U.S. of America
Respondent

ORDER

On February 9, 1984, petitioner Duane Larson was convicted of possession with intent to distribute cocaine in violation of 21 U.S.C. § 841. On May 2, 1984, he was sentenced to ten years of imprisonment. On April 11, 1985, the Court of Appeals affirmed the conviction, concluding that Larson's right to privacy in the motel room in which the cocaine was found had elapsed before the police searched and discovered the cocaine, and that the warrantless search of the hotel room was justified because of exigent circumstances. United States v. Larson, 760 F.2d 852, 855.

In early 1986, Larson filed a petition under 28 U.S.C. § 2255 arguing that the cocaine was seized in violation of his Fourth Amendment right and that his counsel was ineffective for failing to raise this issue. His petition was denied for several reasons, including a factual finding that some of the cocaine was in plain view. The Court of Appeals affirmed, finding that Larson did not raise the Fourth Amendment claim at trial and failed to show actual prejudice from the introduction of the evidence. Larson v. United

Filed July 25, 1994

(P.1).

States. 833 F.2d 758, 759 (8th Cir. 1987).

On August 30, 1988 Larson filed a second petition under 28 U.S.C. § 2255. He argued that the finding that

some of the cocaine was in plain view was in error and that he was entitled to an evidentiary hearing on the matter. Larson also repeated his ineffective assistance argument. The second petition was denied on the merits because the claims would have failed even if the facts alleged by the petitioner were taken as true. The Court of Appeals affirmed the dismissal of the petition. Larson v. United States, 905 F.2d 218, 220 (8th Cir. 1990).

Larson filed a third petition under 28 U.S.C. § 2255 in 1992. again claiming that his Fourth Amendment right had been violated and that he had been given ineffective assistance. He also raised a discovery claim. The Fourth Amendment and ineffective assistance claims were dismissed as successive, the discovery claim was dismissed as abusive. The Court of Appeals affirmed. Larson v. United States. No. 92-2212MN (8th Cir. 1992).

Now before the court is Larson's fourth petition for post trial relief pursuant to 28 U.S.C. § 2255. Larson argues that there has not been a determination on the merits because the files and records have not conclusively resolved the issue of fact regarding whether there was cocaine in plain view. He presents affidavits from officers who conducted the search of his hotel room. He says that the affidavits show that the cocaine was concealed from view when the search began. Larson also argues that he had ineffective representation. He asserts that if his counsel

(P.2).

had immediately interviewed the police officers who conducted the search, they could have successfully raised the Fourth Amendment claim at trial.

The Government responds that petitioner presents no new information, and that both claims raised here have been rejected by this court and the Court of Appeals. It argues that the petition is successive and should be dismissed.

The new affidavits do not provide any information that has not already been considered. Even if the evidence were new, it could not be the basis for habeas relief absent a

showing that it would probably produce an acquittal on retrial. Mastrian v. McManus, 554 F.2d 813, 823 (8th Cir.), cert. denied, 433 U.S. 913, 97 S.Ct. 2985 (1977) (quoted in Larson v. United States, 905 F.2d 218, 221).

A petition may be dismissed as successive if the court finds that it fails to allege new or different grounds for relief and the prior determination was on the merits. Rule 9(b). Rules Governing Section 2255 Proceedings in United States District Courts. Larson has not raised new grounds for relief. The Court of Appeals has ruled in the past that this court's dismissal of Larson's original petition was on the merits and should be given controlling weight. Larson v. United States, 905 F.2d 218, 221. The petition is successive and should be denied.

ORDER

Accordingly, based upon the above, and all the files, records, and proceedings herein, IT IS HEREBY ORDERED that the request for post trial relief under 28 U.S.C. § 2255 is dismissed.

Dated: July 22, 1994

"s_____"
Diana E. Murphy
Chief Judge

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 03-2034
U.S. of America *
Appellee, *
v ϖ. * Ορδερ Δενψινγ Πετιτιον
φορ
* Rehearing and for Rehearing
* En Banc
Duane Wendall Larson *
Appellant. *

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied. (5128-010199)

March 10, 2004
Order Entered at the Direction of the Court:
"s_____"
Michael E. Gans
Clerk, U.S. Court of Appeals, Eighth Circuit

United States District Court
District of Minnesota
Fourth Division
Civil 4-92-1128

Duane Wendall Larson,
Pamela Ann Larson,
Shawna L'Rai Larson,
Alicia Marie Larson
Sheila Burgess
Nichole Burgess, and
Jamie Burgess,

Plaintiffs,

v.

Affidavit of
Brian Schlueter

City of Burnsville, MN
(Personal & Official Capacity)
Burnsville Police Depart. (Personal & Official Capacity)
Clark Holden (Personal & Official Capacity)
Rebecca Berg (Personal & Official Capacity)
Mark Rass (Personal & Official Capacity)
Charles Duetschman (Personal & Official Capacity)
Brian Schlueter (Personal & Official Capacity),
Defendants.

STATE OF WASHINGTON)
(SS
COUNTY OF KING _____)

I, BRIAN SCHLUETER, being sworn under oath depose and state as follows:

1. I am currently a Police Officer with the Bellevue Police Department of Bellevue, Washington.

2. I am the same Sergeant Schlueter who was employed by the Burnsville Police Department of Burnsville, Minnesota on October 29, 1983. when I accompanied Burnsville Police Officer Clark Holden and Police Dispatcher Rebecca Berg to Room 124 of the Burnsville, Minnesota Howard Johnson's Motel to investigate suspected narcotics found there by the motel employees. The Assistant Manger believed the room was abandoned when he called us.

3. We did find cocaine in the room, and as a result, I thereafter testified at the criminal trial of Duane W. Larson for cocaine possession in 1984, in the United States District court, Judge Murphy presiding.

4. Since October 29, 1983 as a part of my duties as a Police officer, I have investigated and arrested many individuals for various offenses, including narcotics violation. In the course of those investigations, I have seen cocaine packed in a number of different ways, often in plastic bags and paper bags.

5. I presently have only a vague general recollection as to what occurred during that October 29, 1983 investigation and the subsequent testimony at Duane Wendall Larson's trial.

6. Even though I do not presently recall all the specific facts set forth in my police report and my testimony from the 1984 Duane Wendall Larson trial, I know that I truthfully and accurately prepared my report and I testified truthfully at that trial, and therefore I presently believe that all of the facts related in my report and the transcript of my trial testimony are accurate, true and correct.

(P.2)

7. After reviewing my report and trial testimony, I have been able to refresh my recollection to the point where I can recall some of the facts as to specific exhibits, the packaging of those exhibits, and the original location of the those exhibits.

8. Prior to our being called, a motel employee had found room 124 unoccupied and without any items present to

indicate occupancy. At about 5:45 p.m., the Assistant Manager personally entered Room 124 and found no person present, but observed several empty liquor bottles and a bag containing plastic bags with a white powder substance inside, which he believed was narcotics. When we arrived, we proceeded to Room 124 with the Assistant Manager, having been advised that the room was unrented and unoccupied. As the Assistant Manager went to open the door, he knocked and a male voice responded from within. The voice was later identified as that of Duane W. Larsson, who was identified by his Minnesota driver's license, when he came out of room 124 and closed the door behind him.

9. Mr. Larson denied us permission to enter the room. The motel General Manager gave us permission to search the room after Duane W. Larson had refused consent to enter the room, and stated that Mr. Larson had no right to be in the room.

10. Duane Larson was, as a matter of routine, told to stand away from the search scene and stay by the doorway area of the motel room in the company of Burnsville Police dispatcher Rebecca Berg and motel personnel William Webster and Donald Peterson while Officer Holden and I searched the room.

(P.3).

11. Upon entering the room, we found an open-topped paper grocery bag on the bed which contained clear plastic bags of white powder inside. The bags of white powder found in that grocery bag were identified at trial as non-narcotic, Exhibits 6, 7 and 8.

12. The bags and powder, along with other items we found, were introduced as evidence at Mr. Larson's trial. After reviewing the police reports, evidence photographs, and the trial testimony, I can recall that trial Exhibits 1, 2 and 3 were found inside a. paper bag in the bathroom. The actual cocaine in these three Exhibits was concealed from view by the paper bag and opaque packaging. We could not determine what was inside until we opened all of the opaque

packaging. As indicated in paragraph 2, we were called to investigate suspected narcotics. We opened the opaque packaging to determine what was inside. As a result, we found the cocaine.

13. To the best of my current recollection:

a. Exhibit No. 1 was packaged as follows: The cocaine was inside three ziplock plastic bags. This in turn, was inside the brown paper grocery bag. Duane Larson contends that the ziplock bags were inside a manila envelope. The trial transcript is not clear on this point. I cannot recall whether Exhibit 1 included a manilla envelope similar to Exhibits 2 and 3.

b. Exhibit No. 2 was packaged **as** follows: The cocaine was inside two or three ziplock plastic bags, which were all inside a manila envelope, which was in turn, inside the same outer brown paper grocery bag as Exhibits 1 and 3. Duane Larson contends the

(P.4).

manila envelope was inside another paper bag. Again, the trial transcript is not clear and I cannot recall if there was a second paper bag or not.

c. Exhibit No. 3 was packaged as follows; The cocaine was inside two or three ziplock plastic bags, then inside a manila envelope. This was in turn inside the same brown paper grocery bag with Exhibits 1 and 2.

d. While I have read trial transcripts that refer to the metal clasps on the manila envelopes, I simply can no longer remember if the clasps were, or were not, closed when I found the envelopes.

As stated. Exhibits 1, 2 and 3 were all within a paper bag in the bathroom. There also was a white garbage style bag involved. I do not recall which, if any, or all of the Exhibits 1, 2 or 3 were also within the white plastic bag. The paper bag was, however, the outer most container.

14. Exhibits No. 4 and No. 9 were found inside brown paper bags which were near the television set, and the cocaine in these two Exhibits was also concealed from view by the

paper bags. We could not determine what was inside the bags until we opened the opaque packaging. As indicated in paragraph 2, we were called to investigate suspected narcotics. We opened the opaque packaging to learn what was inside, and as a result, we found the cocaine.

15. To the best of my current recollection:
a. Exhibit No. 4 was packaged as follows: The cocaine was inside two ziplock plastic bags; these were then inside a brown

(P.5).

paper grocery bag, which was in turn, inside another brown paper grocery bag.
b. Exhibit No. 9 was packaged as follows: The cocaine was inside two plastic ziplock bags; these were then inside at least one brown paper bag.
c. Duane Larson contends that Exhibits 4 and 9 were packaged in the same large grocery bag. At this time, I cannot recall whether or not they were both in the same bag.
16. Dane W. Larson has contended that he was out of the room retrieving the cocaine from storage when the motel Assistant Manager was in motel room 124, and saw some white powder which the Assistant Manager thought was cocaine. Duane W. Larson has also contended that he brought the real cocaine back to the room after the Assistant Manager left the room, just minutes before I and Officer Holden arrived. I have no personal knowledge of this, and therefore cannot confirm or deny his contentions.
17. I have no recollection of being personally interviewed by any attorney representing Duane Wendall Larson prior to his trial in 1984; however, I believe that his attorneys were furnished a copy of my police report by the United States Attorney's office. To my knowledge Duane Larson's attorneys made no attempt to interview any Burnsville Police Department officers before trial. Had they done so, I would have talked with them only upon advice from the United States Attorney's office.

(P.6).

18. If properly called to testify in any court, I would testify that the entire content of this affidavit is true and accurate to the best of my knowledge and current recollection. FURTHER YOUR AFFIANT SAYETH NOT.

"s/_____"
Brian Schlueter

Subscribed and sworn to before me this 30th day of November, 1993.
"s/_____"
James L. Hobab
Notary Public
State – Washington
County – King
Exp – 11/18/94

(P.7).

United States District Court
District of Minnesota
Fourth Division
Civil 4-92-1128

Duane Wendall Larson,
Pamela Ann Larson,
Shawna L'Rai Larson,
Alicia Marie Larson
Sheila Burgess
Nichole Burgess, and
Jamie Burgess,

Plaintiffs,

v.

City of Burnsville, MN
(Personal & Official Capacity)
Burnsville Police Depart. (Personal & Official Capacity)
Clark Holden (Personal & Official Capacity)
Rebecca Berg (Personal & Official Capacity)
Mark Rass (Personal & Official Capacity)
Charles Duetschman (Personal & Official Capacity)
Brian Schlueter (Personal & Official Capacity),

Defendants.

Affidavit of
Clark Holden

STATE OF MINNESOTA)
(SS
COUNTY OF DAKOTA__)

I, CLARK HOLDEN, being sworn under oath depose and state as follows:

1. I am currently a Police Officer with the Burnsville Police Department of Burnsville, Minnesota.

(P.1)

2. I am the same Officer Holden who was employed by the Burnsville Police Department of Burnsville, Minnesota on October 29, 1983, when I accompanied Burnsville Police Sergeant Brian Schlueter and Police Dispatcher Rebecca Berg to Room 124 of the Burnsville, Minnesota Howard Johnson's Motel to investigate suspected narcotics found there by the motel employees. The Assistant Manger believed the room was abandoned when he called us.

3. We did find cocaine in the room, and as a result, I thereafter testified at the criminal trial of Duane W. Larson for cocaine possession in 1984, in the United States District court, Judge Murphy presiding.

4. Since October 29, 1983 as a part of my duties as a Police officer, I have investigated and arrested many individuals for various offenses, including narcotics violation. In the course of those investigations, I have seen cocaine packed in a number of different ways, often in plastic bags and paper bags.

5. I presently have only a vague general recollection as to what occurred during that October 29, 1983 investigation and the subsequent testimony at Duane Wendall Larson's trial.

6. Even though I do not presently recall all the specific facts set forth in my police report and my testimony from the 1984 Duane Wendall Larson trial, I know that I truthfully and accurately prepared my report and I testified truthfully at that trial, and therefore I presently believe that all of the facts related in my report and the transcript of my trial testimony are accurate, true and correct.

(P.2)

7. After reviewing my report and trial testimony, I have been able to refresh my recollection to the point where I can recall some of the facts as to specific exhibits, the packaging of those exhibits, and the original location of the those exhibits.

8. Prior to our being called, a motel employee had found room 124 unoccupied and without any items present to

indicate occupancy. At about 5:45 p.m., the Assistant Manager personally entered Room 124 and found no person present, but observed several empty liquor bottles and a bag containing plastic bags with a white powder substance inside, which he believed was narcotics. When we arrived, we proceeded to Room 124 with the Assistant Manager, having been advised that the room was unrented and unoccupied. As the Assistant Manager went to open the door, he knocked and a male voice responded from within. The voice was later identified as that of Duane W. Larsson, who was identified by his Minnesota driver's license, when he came out of room 124 and closed the door behind him.

9. Mr. Larson denied us permission to enter the room. The motel General Manager gave us permission to search the room after Duane W. Larson had refused consent to enter the room, and stated that Mr. Larson had no right to be in the room.

10. Duane Larson was, as a matter of routine, told to stand away from the search scene and stay by the doorway area of the motel room in the company of Burnsville Police dispatcher Rebecca Berg and motel personnel William Webster and Donald Peterson while Sergeant Schlueter and I searched the room.

(P.3).

11. Upon entering the room, we found an open-topped paper grocery bag on the bed which contained clear plastic bags of white powder inside. The bags of white powder found in that grocery bag were identified at trial as non-narcotic, Exhibits 6, 7 and 8.

12. The bags and powder, along with other items we found, were introduced as evidence at Mr. Larson's trial. After reviewing the police reports, evidence photographs, and the trial testimony, I can recall that trial Exhibits 1, 2 and 3 were found inside a. paper bag in the bathroom. The actual cocaine in these three Exhibits was concealed from view by the paper bag and opaque packaging. We could not determine what was inside until we opened all of the opaque

packaging. As indicated in paragraph 2, we were called to investigate suspected narcotics. We opened the opaque packaging to determine what was inside. As a result, we found the cocaine.

13. To the best of my current recollection:

a. Exhibit No. 1 was packaged as follows: The cocaine was inside three ziplock plastic bags. This in turn, was inside the brown paper grocery bag. Duane Larson contends that the ziplock bags were inside a manila envelope. The trial transcript is not clear on this point. I cannot recall whether Exhibit 1 included a manilla envelope similar to Exhibits 2 and 3.

b. Exhibit No. 2 was packaged **as** follows: The cocaine was inside two or three ziplock plastic bags, which were all inside a manila envelope, which was in turn, inside the same outer brown paper grocery bag as Exhibits 1 and 3. Duane Larson contends the

(P.4).

manila envelope was inside another paper bag. Again, the trial transcript is not clear and I cannot recall if there was a second paper bag or not.

c. Exhibit No. 3 was packaged as follows; The cocaine was inside two or three ziplock plastic bags, then inside a manila envelope. This was in turn inside the same brown paper grocery bag with Exhibits 1 and 2.

d. While I have read trial transcripts that refer to the metal clasps on the manila envelopes, I simply can no longer remember if the clasps were, or were not, closed when I found the envelopes.

As stated. Exhibits 1, 2 and 3 were all within a paper bag in the bathroom. There also was a white garbage style bag involved. I do not recall which, if any, or all of the Exhibits 1, 2 or 3 were also within the white plastic bag. The paper bag was, however, the outer most container.

14. Exhibits No. 4 and No. 9 were found inside brown paper bags which were near the television set, and the cocaine in these two Exhibits was also concealed from view by the

paper bags. We could not determine what was inside the bags until we opened the opaque packaging. As indicated in paragraph 2, we were called to investigate suspected narcotics. We opened the opaque packaging to learn what was inside, and as a result, we found the cocaine.

15. To the best of my current recollection:

a. Exhibit No. 4 was packaged as follows: The cocaine was inside two ziplock plastic bags; these were then inside a brown

(P.5).

paper grocery bag, which was in turn, inside another brown paper grocery bag.

b. Exhibit No. 9 was packaged as follows: The cocaine was inside two plastic ziplock bags; these were then inside at least one brown paper bag.

c. Duane Larson contends that Exhibits 4 and 9 were packaged in the same large grocery bag. At this time, I cannot recall whether or not they were both in the same bag.

16. Dane W. Larson has contended that he was out of the room retrieving the cocaine from storage when the motel Assistant Manager was in motel room 124, and saw some white powder which the Assistant Manager thought was cocaine. Duane W. Larson has also contended that he brought the real cocaine back to the room after the Assistant Manager left the room, just minutes before I and Sergeant Schlueter arrived. I have no personal knowledge of this, and therefore cannot confirm or deny his contentions.

17. I have no recollection of being personally interviewed by any attorney representing Duane Wendall Larson prior to his trial in 1984; however, I believe that his attorneys were furnished a copy of my police report by the United States Attorney's office. To my knowledge Duane Larson's attorneys made no attempt to interview any Burnsville Police Department officers before trial. Had they done so, I would have talked with them only upon advice from the United States Attorney's office.

18. If properly called to testify in any court, I would testify that the entire content of this affidavit is true and accurate to the best of my knowledge and current recollection. FURTHER YOUR AFFIANT SAYETH NOT.

"s/_____"
Clark Holden

Subscribed and sworn to before me this 29th day of November, 1993.
"s/_____"
Lola L. Kirchner
Notary Public - Minnesota
Dakota County
My commission Expires June 29, 1996.

United States District Court
District of Minnesota
Fourth Division
Civil 4-92-1128

Duane Wendall Larson,
Pamela Ann Larson,
Shawna L'Rai Larson,
Alicia Marie Larson
Sheila Burgess
Nichole Burgess, and
Jamie Burgess,

Plaintiffs,

Affidavit of
Rebecca Berg

v.

City of Burnsville, MN
(Personal & Official Capacity)
Burnsville Police Depart. (Personal & Official Capacity)
Clark Holden (Personal & Official Capacity)
Rebecca Berg (Personal & Official Capacity)
Mark Rass (Personal & Official Capacity)
Charles Duetschman (Personal & Official Capacity)
Brian Schlueter (Personal & Official Capacity),
Defendants.

STATE OF MINNESOTA)
(SS
COUNTY OF DAKOTA__)

I, REBECCA BERG, being sworn under oath depose and state as follows:

1. I am currently a Police Dispatcher with the Burnsville Police Department of Burnsville, Minnesota.

(P.1)

2. I am the same Rebecca Berg who was employed by the Burnsville Police Department of Burnsville, Minnesota on October 29, 1983, when I accompanied Burnsville Police Officers Clark Holden and Brian Schlueter to Room 124 of the Burnsville, Minnesota Howard Johnson's Motel to investigate suspected narcotics found by the Motel Manager.
3. While Sergeant Schlueter and Officer Holden searched Room 124, I remained next to Duane W. Larson in the doorway area of Room 124. Duane Larson was not allowed by the Police Officers to reenter Room 124 any further than the entry way area.
4. To my knowledge, Duane Larson's attorneys made no attempt to interview any Burnsville Police Department Officers before trial. Had they done so, I would have talked with them only upon direction from the United States Attorney's office.

FURTHER YOUR AFFIANT SAYETH NOT.

"s/_____"
Rebecca Berg

Subscribed and sworn to before me this 29th day of November, 1993.
"s/_____"
Lola L. Kirchner
Notary Public - Minnesota
Dakota County
My commission Expires June 29, 1996.

(P.2).

United States District Court
District of Minnesota
Fourth Division
Civil 4-92-1128

Duane Wendall Larson,
Pamela Ann Larson,
Shawna L'Rai Larson,
Alicia Marie Larson
Sheila Burgess
Nichole Burgess, and
Jamie Burgess,

Plaintiffs,

v.

Affidavit of
Mark Raas

City of Burnsville, MN
(Personal & Official Capacity)
Burnsville Police Depart. (Personal & Official Capacity)
Clark Holden (Personal & Official Capacity)
Rebecca Berg (Personal & Official Capacity)
Mark Rass (Personal & Official Capacity)
Charles Duetschman (Personal & Official Capacity)
Brian Schlueter (Personal & Official Capacity),
Defendants.

STATE OF MINNESOTA)
(SS
COUNTY OF DAKOTA__)

I, MARK RAAS, being sworn under oath depose and state as follows:

1. I am currently a Police Officer with the Burnsville Police Department of Burnsville, Minnesota.

(P.1)

2. I am the same Mark Raas who was employed by the Burnsville Police Department of Burnsville, Minnesota during 1983 and 1984, and the one that was assigned as Case Officer to the Duane W. Larson cocaine case generated by Burnsville Police Officers Clark Holden and Brian Schlueter regarding cocaine found by them at Room 124 of the Burnsville, Minnesota Howard Johnson's Motel.

3. To my knowledge, Duane Larson's attorneys made no attempt to interview any Burnsville Police Department Officers before trial. Had they done so, I would have talked with them only upon direction from the United States Attorney's office.

FURTHER YOUR AFFIANT SAYETH NOT.

"s/_____"
Mark Raas

Subscribed and sworn to before me this 29th day of November, 1993.

"s/_____"
Lola L. Kirchner
Notary Public - Minnesota
Dakota County
My commission Expires June 29, 1996.

(P.2).

Cocaine Possession: Reporting Officer – B. Schlueter Badge No. S-3. Case File # 83014156. Date: 10/29/83 @ 1816. P.1. (of one).

Narrative:
The following is a supplemental narrative report that identifies and locates 14 items of evidence found in room #124 at the Howard Johnson's Motel on 10/29/83, and corresponds numerically with the Property Inventory Report

1. Plastic bag (3) with white substance in inner-most bag. Found on bathroom counter with items #2 and #3 in large paper bag.
2. Plastic bag containing manilla envelope marked 125 + 12.5 with white substance inside. Found with #1 and #3 in bathroom.
3. Plastic bag containing manila envelope marked 250 + 12.5 with white substance inside in a third plastic bag. Found with #1 and #2 in bathroom.

* Items #1, #2, and #3 found in "Winn Dixie" paper bag in bathroom.

4. Triple plastic bag in a small paper bag inside a large "SuperV" paper bag. Found on the floor under the television.
5. Large plastic bag with white powder substance. Found on bed under covers.
6. Large plastic bag with white powder substance found in "Super Value" bag on top of bed. #7 and #8 also in same paper bag.
7. Ziplock bag ¼ full of white powder substance. Found in paper bag with #6 and #8.
8. Plastic cup with powder substance found in paper bag with #6 and #7. Cup from "Motor Hotel".

* Found in bag with #6, #7, and #8 were two empty bags.

9. Small plastic bag inside another plastic bag containing white substance. This substance tested positive for cocaine, using a NIK Test Kit, found in small paper bag on floor under television.

10. Green plastic sifter found in small paper bag on floor under television.
11. Set of two keys, found on top of dresser.
12. Motel receipt showing 10/28/83 check-in and 10/29/83 check-out for room #124. Found on top of dresser.
13. Key found in pocket of vest which was found on floor of room.
14. Triple balance scale found in black case in plain paper bag on top of bed "Ohaus" brand.

End of report by B. Schlueter, S-3. Typed by L. Kirchner.

LAB REPORT

Agency No. 83014156. Laboratory No. 83-1367.

The results of laboratory examinations of the submitted evidence is listed below:

Item #	Amount	Contents
1	500.2 grs	Powder containing cocaine
2	125.4 grs	Powder containing cocaine
3	250.4 grs	Powder containing cocaine
4	500.9 grs	Powder containing cocaine

Tests indicate that the powders in items 1 through 4 are essentially undiluted.

5	2028 grs	mannitol
6	2378 grs	lactose
7	219 grs	mannitol
8	6.4 grs	mannitol
9	10.2 grs	powder containing cocaine
10	-	no analysis (due to absence of samples)

I hereby certify that the above report is true and correct.

"s/_____"
Patricia Clausen Wojtowicz
Crime Laboratory Analyst

Disposition of Evidence:

XX Evidence is being held pending further testing.
PCW:1cb
Distribution: Burnsville PD – 1
DEA –1
Lab - 1

Department of Justice
U.S. Parole Commission Certificate of Early Termination.

Larson, Duane Wendall 01786-041

Date Sentence Imposed: 05/02/84.
Date Supervision Began: 12/09/94.
District of Supervision: Central California

Inasmuch as you have successfully completed a period of parole supervision, and the U.S. Parole Commission is of the opinion that you will not again engage in conduct which will violate any criminal law:

You are Hereby Discharged from Special Parole.

By this action, you are no longer under the jurisdiction of the U.S. Parole Commission.

"s/_____" Nov. 13, 1995
Carol Pavilack Getty Date.
Regional Commissioner

X Parolee Copy
File copy